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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

EXXON CORPORATION,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Exxon Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, pp. 1a-22a)[1] is not yet reported. The opinion of the District Court (App. E, pp. 29a-36a) is not officially reported; it is unofficially reported at 4 CCH Energy Management ¶ 26,181.

JURISDICTION

The judgment of the Court of Appeals (App. B, pp. 23a-24a) was entered on February 26, 1980. The juris-

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[1] "App." refers to the appendix to this petition.

diction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of Energy has authority to issue a subpoena to obtain information for a study of motor fuel marketing subsidization under Title III of the Petroleum Marketing Practices Act.

2. Whether, in issuing a subpoena to obtain such information, the Secretary's subordinate employee may properly refuse to follow Department of Energy regulations governing administrative review and supervision of the exercise of delegated subpoena power.

STATUTES AND REGULATIONS INVOLVED

Section 203(a) and (e) and Section 301 of the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2823(a) and (e) and 2841, Section 645 of the Department of Energy Organization Act, 42 U.S.C. § 7255, and Section 205.8 of the Department of Energy's regulations are set forth in Appendix K, p. 95a-101a.

STATEMENT

A divided panel of the Court of Appeals (Chief Judge Wright, Senior Judge Bazelon; Judge Wilkey dissenting) affirmed the District Court's summary enforcement of an administrative subpoena issued to petitioner Exxon Corporation by a Department of Energy employee. The purpose of the subpoena was to obtain information for a study required by Title III of the Petroleum Marketing Practices Act.

Exxon contends that the subpoena is invalid and unenforceable for two reasons. First, Congress deliberately withheld from the Secretary of Energy the power to

issue compulsory process for purposes of the Title III study. Second, the employee who purported to issue the subpoena in this case unlawfully refused to submit to the Department's established administrative procedure for reviewing and supervising the use of delegated subpoena power.

1. The Petroleum Marketing Practices Act.

Title III of the Petroleum Marketing Practices Act ("PMPA"), Pub. L. No. 95-297, 92 Stat. 337, 15 U.S.C. § 2841, was adopted on the floor of the Senate as a substitute for a controversial version that had been narrowly approved by the Senate Committee on Energy and Natural Resources. As enacted in June 1978, Title III directed the Secretary of Energy to "conduct a study of the extent to which producers, refiners, and other suppliers of motor fuel subsidize the sale of such motor fuel at retail or wholesale with profits obtained from other operations." § 301(a), 15 U.S.C. § 2841(a). The Act instructed the Secretary to submit a report to Congress on the results of his study, together with any legislative recommendations, by December 19, 1979. § 301(d)(1), 15 U.S.C. § 2841(d)(1).[2]

In Title II of the same Act, Congress established requirements for the testing, certification, and posting of gasoline octane ratings; it authorized the Federal Trade Commission to enforce compliance with those requirements; and it expressly empowered the FTC "to require the filing of reports, the production of documents, and the appearance of witnesses, as though the applicable terms and conditions of the Federal Trade Commission Act were part of this title." § 203(a), 15 U.S.C. § 2823

[2] The Secretary has not yet submitted a report to Congress. The Department of Energy employee responsible for conducting the study stated in affidavits filed with the District Court and the Court of Appeals that he has unilaterally extended the deadline twice and now proposes to submit a report by April 30, 1980.

(a). In Title III, by contrast, Congress did not empower the Secretary of Energy to obtain information for his study by compulsory process. The Act provided, instead, that "the Secretary shall give appropriate notice and afford interested persons an opportunity to present written and oral data, views and arguments concerning such study." § 301(c), 15 U.S.C. § 2841(c). The author of Title III, Senator Bumpers, told his colleagues on the floor of the Senate that the Secretary "will not have the right to get the information under subpena powers * * *." 124 Cong. Rec. S 7155 (Daily ed., May 9, 1978) (reproduced at App. I, p. 75a).

2. The Exxon Subpoena and Administrative Proceedings.

In January 1979, the Department of Energy published a proposed "study plan" in which it stated that it would attempt to issue subpoenas selectively to nine unnamed companies to obtain "internal, corporate planning documents" for the Title III study. 44 Fed. Reg. 3548, 3552 (January 17, 1979). The notice cited no statutory authority for the use of compulsory process, and it made no attempt to reconcile the use of subpoenas with Title III's language and legislative history. A few days later, the Director of the Office of Competition, a sub-unit of the Department's Office of Policy and Evaluation, signed and mailed a subpoena purporting to direct the Chief Executive Officer of Exxon Corporation to appear and to produce for examination documents responsive to 12 broad specifications. App. H, pp. 42a-46a.

The subpoena covered a nine-year period (January 1, 1970, through January 22, 1979). *Id.* at 44a. Although it invoked the authority of the Department of Energy Organization Act and the Federal Energy Administration Act, its sole stated purpose was to obtain "information for use in the preparation of a study required by Title III of the Petroleum Marketing Practices Act." *Id.* at 42a.

Exxon filed an application to quash or modify the subpoena.[3] The application challenged the agency's statutory authority to issue the subpoena, sought to narrow the subpoena's scope and to clarify its terms, and requested adequate protective measures to prevent improper disclosure of the wide range of highly confidential and competitively sensitive internal documents demanded by the subpoena. One month later, the employee who had signed the subpoena sent Exxon a four-sentence letter rejecting the application to quash. The letter stated in its entirety (App. G, p. 41a):

> I have received the "Application to Quash or Modify Subpoena" filed on March 20, 1979. There are no provisions in the DOE rules providing for such motions. I am, moreover, unpersuaded by your arguments.
>
> Since we have been unable to reach a satisfactory agreement regarding document production, I am turning this matter over to the Office of the General Counsel.

3. District Court Proceedings.

In June 1979, the United States filed in the United States District Court for the District of Columbia a petition to enforce the administrative subpoena issued to Exxon. J.A. 83-86.[4] Six months later, in December 1979, the District Court granted the government's

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[3] Department of Energy regulations provided for a three-stage process for administrative review of the exercise of delegated subpoena power. 10 C.F.R. § 205.8 (1978) (reproduced at App. K, pp. 98a-101a).

[4] The government simultaneously filed a petition to enforce an identical subpoena that had been issued to Shell Oil Company. J.A. 87-90. It filed a petition to enforce the subpoena issued to Marathon Oil Company in October 1979. J.A. 108-111.

"J.A." refers to the Joint Appendix in the Court of Appeals, a copy of which has been lodged with the Clerk of this Court.

petition and directed Exxon to produce documents responsive to the subpoena upon not less than 10 days' notice. App. D, pp. 27a-28a.[5]

In a supporting memorandum entered a month later, the Court reasoned that the Secretary has broad subpoena power under the Department of Energy Organization Act ("DOE Act") and that "nothing in the PMPA or its legislative history * * * suggests that * * * Congress acted to limit or prohibit the use of subpoenas" for purposes of the Title III study. App. E, p. 32a. The Court also held that the agency was free to bypass its own regulations governing administrative review of subpoenas because the Title III study did not fall within the categories of "proceedings" to which the C.F.R. Part containing those regulations expressly applied. App. E, pp. 34a-35a.[6]

4. Decision of the Court of Appeals.

On consolidated appeals, a divided panel of the Court of Appeals affirmed the District Court's orders subject to a "protective order." App. A, pp. 1a-22a.

The panel's majority (Chief Judge Wright, Senior Judge Bazelon) concluded that, despite the language and legislative history of Title III itself, the Secretary could properly issue the subpoenas in this case by invoking his general power of compulsory process under Section 645 of the DOE Act, 42 U.S.C. § 7255. According to the Court, "Congress would have had to build into Title III a clear withdrawal of subpoena power if it did not want DOE to issue subpoenas for the Title III study." App. A, p. 6a. The majority concluded that Congress had not satisfied that standard.

[5] The District Court entered identical orders in the *Shell* and *Marathon* cases.

[6] The District Court stayed its own orders pending an expedited appeal to the Court of Appeals. App. F, pp. 37a-40a.

The panel acknowledged that "Senator Bumpers [Title III's author] thought there would be no subpoena power under Title III * * *." *Id.* at 8a. But the court discounted the Senator's repeated assertions to that effect—assertions that it characterized as "stray remark[s] in the legislative history" (*id.* at 10a)—because in its view the Senator's "assumption that DOE would have no subpoena power * * * was simply not centrally relevant to the debate." *Id.* at 8a.

The Court saw no significance in the fact that Title II, unlike Title III, contains an explicit grant of subpoena power to the FTC. The majority stated that "Congress may have felt a need to spell out the FTC's enforcement powers in some detail" but (notwithstanding the remarks of Senator Bumpers) "may reasonably have understood Title III to incorporate DOE's general enforcement powers * * *." *Id.* at 9a.

Finally, the panel held that the employee who issued the subpoena could properly refuse to submit to the agency's established administrative review procedure—and could thereby force the parties directly into court—because the "scope" section of the C.F.R. Part in which the regulations are codified did not expressly mention subpoenas issued under the Petroleum Marketing Practices Act. *Id.* at 12a. The Court acknowledged that its reading of the regulations "may not be obvious"; it rested its conclusion, however, on the principle that "an agency is entitled to very broad deference when it construes its own regulations, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) * * *." App. A, p. 12a. The Court pointed to no agency "construction" of the relevant regulation apart from the four-sentence letter written by the employee who signed the subpoena. See p. 5, *supra*.[7]

[7] In affirming the District Court's order, the Court of Appeals modified the subpoenas to incorporate some of the confidentiality provisions that were contained in settlement agreements that the

Judge Wilkey dissented. In his view, the Secretary cannot use his general subpoena power to conduct the Title III study because Congress deliberately withheld subpoena power in connection with that study. Judge Wilkey stated: "On the face of the statute there is no subpoena power under Title III, there is admittedly not one word in the legislative history implying there is such a power, and there are words from two of the legislators most active on this statute saying flatly that no subpoena power exists for the Title III study, a repeated assertion which was repeatedly uncontradicted." App. A, p. 22a.[8]

REASONS FOR GRANTING THE WRIT

The Court of Appeals has given the Secretary of Energy a coercive power that Congress, in a meticulously crafted legislative compromise, deliberately withheld. The Court was able to reach that result only by belittling the extraordinarily explicit statements of Title III's author and by turning on its head this Court's traditional rule that administrative subpoena power will be inferred only on the strength of unmistakable legislative intent.

The Court's frustration of the Congressional will takes on added significance when coupled with its abandonment of the historic relationship between court and agency in subpoena enforcement cases. The foundation of the summary enforcement procedure has always been

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Department of Energy had entered into with other companies. App. A, pp. 14a-21a. The Court's modification of the subpoenas does not affect in any way the legal issues presented by this petition. The invalidity of the administrative subpoenas here cannot be cured by the addition of provisions dealing with the confidentiality of documents.

[8] The Court of Appeals granted motions for a stay pending certiorari, and it stayed the issuance of its mandate until March 10, 1980. App. C, p. 25a. This petition was filed on or before that date. Under Rule 41(b) of the Federal Rules of Appellate Procedure, the stay will remain in effect until final disposition by this Court.

the availability of an administrative review mechanism by which the agency supervises the exercise of delegated subpoena power, and through which issues are narrowed, facts are developed, and disputes sometimes are resolved. See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 653-654 (1950); *Reisman* v. *Caplin*, 375 U.S. 440, 445-449 (1964). In sanctioning the Department of Energy's refusal to apply its published review procedure in this case, the Court of Appeals has given agencies a green light to force subpoena litigation directly into the courts without supervising the exercise of delegated subpoena power and without providing an avenue for pre-enforcement dispute resolution.

These issues are important; they warrant plenary consideration by this Court.

A. Congress Deliberately Withheld Subpoena Power for Purposes of the Title III Study.

1. Mr. Justice Holmes, writing for the Court in *Harriman* v. *ICC*, 211 U.S. 407, 421 (1908), warned that compulsory process is an "autocratic power," the sweep of which, in the hands of an administrator, must not be expanded "on the strength of other than explicit and unmistakable words * * *." The Court struck the same chord in *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357 (1942), where it refused to infer a Congressional intent to give the Wage and Hour Administrator "unrestricted authority to delegate the subpoena power" when the statute's terms granted the power "only to the responsible head of the agency." *Id.* at 364. The Court stated (*id.* at 363):

> Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer.

Even in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946)—where the Court upheld an administrator's subpoena authority in the face of "'the most explicit language' which leaves no room for questioning Congress' intent" (*id.* at 201)—the Court emphasized that "the interests of men to be free from officious intermeddling" (*id.* at 213) dictate a cautious approach to the existence of administrative subpoena power.[9]

The Court of Appeals has inverted this Court's longstanding presumption. Instead of insisting on an explicit grant of subpoena power for Title III, the majority below held that "Congress would have had to build into Title III a clear *withdrawal* of subpoena power if it did not want DOE to issue subpoenas for the Title III study." App. A, p. 6a (emphasis added).

2. The Court not only asked the wrong question but also gave the wrong answer. Even under the majority's inverted standard, the language and legislative history of PMPA *do* reflect "a clear withdrawal of subpoena power * * *." *Ibid.*

The face of the statute itself strongly implies an intention to withhold the power of compulsory process. Congress gave the FTC explicit subpoena power in Title II; in Title III, by contrast, it merely directed the Secretary of Energy to give the public an opportunity to participate in the subsidization study. Compare § 203(a), 15 U.S.C. § 2823(a), with § 301(c), 15 U.S.C. § 2841(c). When the legislature confers a power in one portion of an Act but omits any mention of that power in an adjacent portion of the same Act, one may reasonably

[9] These principles are founded in the Constitution. "[W]hen an administrative agency subpoenas corporate books or records," the Fourth Amendment limits the agency to such "reasonable inspections" as are "contemplated by statute." *See* v. *City of Seattle*, 387 U.S. 541, 544, 545 (1967).

infer that the omission reflects an intention to withhold the power.[10]

3. The legislative history corroborates with uncommon clarity what the text of the Act implies.

As it emerged from Committee, Title III would have prohibited subsidization of motor fuel marketing operations with funds or services derived from other petroleum-related operations. See S. Rep. No. 95-731, 95th Cong., 2nd Sess. 13-15 (1978). By the time the bill reached the Senate floor, however, Senator Domenici, a principal author of the Committee's version of Title III, acknowledged that the bill would be defeated unless Title III were eliminated or amended. 124 Cong. Rec. S 7151 (Daily ed., May 9, 1978) (App. 53a, 55a).[11] Senator

[10] The majority below answered this argument with a non sequitur—that Title II differs from Title III because the former is "a directive to *private* parties" while the latter is "a directive to a government agency" (App. A, p. 9a; emphasis in original). We cannot fathom the significance of that distinction. It therefore merely begs the question to say that "Congress may have felt a need to spell out the FTC's enforcement powers in some detail" but "may reasonably have understood Title III to incorporate DOE's general enforcement powers from the [DOE Act]." *Ibid.* The panel advanced no explanation of why Congress should have felt a different need in Title II than in Title III.

The majority was also unable to explain away the explicit subpoena power conferred by the same Congress in subsequent legislation enacted only a few months later. Section 711(a) of the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 42 U.S.C. § 8421; see also Section 251 of the Emergency Energy Conservation Act of 1979, Pub. L. No. 96-102. If, as the majority asserted, the later grants of subpoena power were a product of uncertainty and a desire to avoid litigation (App. A, p. 9a), why did those concerns not lead to the same explicit grant of power in the PMPA? The situation here is similar to that in *Cudahy Packing Co.* v. *Holland*, *supra*, where the Court inferred "a Congressional purpose that the subpoena power shall be delegable only when an authority to delegate is expressly granted" (315 U.S. at 366). There, as here, Congress had spoken clearly in other statutes when it wished to grant the relevant authority. *Id.* at 365-366.

[11] The Senate debate on Title III is reproduced at App. I, pp. 47a-85a.

Bumpers, one of the Committee members who had opposed the entire bill because of Title III, offered an amendment that he described as "a compromise on the issue of Title III" (*id.* at 7150; App. 48a). His amendment was ultimately approved by the Senate and enacted into law as Title III of PMPA.

Senator Bumpers consciously fashioned his amendment to exclude the power of compulsory process. This much is vividly revealed by the floor debate on an amendment offered by Senator Kennedy.

Senator Kennedy's proposal would have compelled the Secretary of Energy to make available to other federal agencies any energy information he acquired in connection with the subsidization study called for by the Bumpers amendment. *Id.* at 7152; App. 61a-62a. Senator Bumpers strongly opposed the Kennedy amendment. He said that requiring the Secretary of Energy to share the information he collected for the study would ensure that the industry would refuse to furnish information voluntarily to the Secretary:

> If you want to make sure that the Secretary of Energy gets no cooperation in carrying out the terms of this [*i.e.*, the Bumpers] amendment, just adopt the amendment of the Senator from Massachusetts, and I promise you that hell will freeze over before they will voluntarily give one ounce of information, because they know it is going to be disseminated to everybody under the shining Sun. [*Id.* at 7153; App. 65a.]

Senators Durkin and Kennedy, arguing in favor of the Kennedy amendment, implied that it would ensure access to more information than the Bumpers proposal. Senator Durkin asked: "Why in God's name is this body so afraid of information? * * * Why insist that we be blindfolded?" *Id.* at 7155; App. 74a. Senator Kennedy ridiculed the suggestion of Senator Bumpers that the oil companies "will give us all the information we want." *Id.* at 7155; App. 75a.

Senator Bumpers responded vigorously, rejecting the suggestion that the Kennedy amendment would in any way increase the amount of information available to the government. He stated:

> Just so no one is deceived by what we are talking about, from what the Senator from Massachusetts just said one would infer that if his amendment is adopted they could go into the oil companies and they would have to cough up the information. That is not the case. His amendment has nothing to do with what kind of energy information they will get. They will get no more information under his amendment than under mine. *They will not have the right to get the information under subpena powers either way.* The only thing the Kennedy amendment requires is the sharing of the information it gets. It does not give the Secretary one iota of authority to get the information. *It does not require the oil companies to divulge one iota of information they do not want to give.* What we are talking about is who they will give it to after they get it. That is all the [Kennedy] amendment goes to. [*Id.* at 7155; App. 75a-76a (emphasis added).]

To reinforce his point, Senator Bumpers contrasted the nature of the Secretary's authority in preparing the subsidization study called for by his amendment with the compulsory process available to the Department of Justice:

> The Justice Department has subpena powers. If they are sure that something is going on that is wrong among major oil companies, *they can subpoena the information. They do not have to request it. They do not have to ask for their cooperation. Here we do.* [*Id.* at 7155; App. 74a (emphasis added).]

No one, not even Senator Kennedy or Senator Durkin, contradicted Senator Bumpers's statement that for purposes of his amendment the Secretary would have no

power of compulsory process and would have to proceed solely by seeking voluntary cooperation. It was on the basis of this understanding, which Senator Bumpers obviously believed was important to secure passage of the bill,[12] that the Senate voted to reject Senator Kennedy's amendment and to approve the Bumpers amendment. One could hardly ask for a clearer expression of Congressional purpose with respect to the subpoena issue.[13]

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[12] Senator Bumpers knew that expedition was an important element of his compromise. Senator Domenici, spokesman for those who had favored the Committee's version of Title III, joined as a co-sponsor of the Bumpers amendment. 124 Cong. Rec. S 7150; App. 48a. His remarks demonstrated both that his support of the compromise depended upon the expeditious schedule set for the Title III study (*id.* at 7151; App. 55a), and that he was sensitive to the inevitable delays that would result from the use of subpoenas. *Id.* at 7150; App. 52a. Senator Bumpers, too, knew that efforts to use compulsory process to obtain sensitive corporate documents had been "tied up in court for years * * *." *Id.* at 7154; App. 71a. Since "we are in a time constraint of 18 months for the study" (*id.* at 7154; App. 72a), Senator Bumpers concluded that the best way to proceed was to rely on information already available and data that the industry would provide voluntarily.

[13] The Congressional intent was later confirmed on the floor of the House when that body approved the Senate amendment. Congressmen Dingell and Brown, Chairman and ranking minority member of the House Subcommittee on Energy and Power, exchanged observations for the obvious purpose of creating legislative history concerning the understandings on which the legislation would rest. Concerned about imposing unduly burdensome or extensive reporting requirements on members of the public, Congressman Brown had met with the Deputy Secretary of Energy to discuss the means by which the Department proposed to collect the information for the Title III study. Congressman Brown reported:

> * * * I met yesterday at some length with officials of the Department of Energy, including Mr. John O'Leary, who have advised me that it is the plan of the Department of Energy to use the existing EIA P-302 and 306 forms by which they gather information from refineries, plus revised Bureau of Labor Statistics and Census surveys, in order to give them sufficient information regarding supply and price and market distribution to meet the minimum statutory requirements of the legislation under consideration at this point. [124 Cong. Rec. H 5002 (Daily ed., June 6, 1978) (App. J, p. 92a).]

Against this background, we are mystified by the Court of Appeals' statement that the position of Senator Bumpers on the subpoena issue "was simply not centrally relevant to the debate." App. A, p. 8a. On the contrary, the entire debate *turned* on that issue. Had Senator Kennedy been able to say that the Secretary of Energy *would* have subpoena power for purposes of Title III, Senator Bumpers's opposition to the Kennedy amendment would have collapsed.

Honoring the Congressional purpose in Title III does not lead to a "repeal or amendment by implication" of any other statute. App. A, p. 10a. In the first place, the DOE Act, upon which the majority below relied, does not authorize the Secretary to issue subpoenas for the Title III study.[14] In any event, the controlling principle here

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Thus, like the Senate, the House voted to approve the PMPA on the understanding that the Secretary of Energy would not use compulsory process to conduct the study called for under Title III. Rather, as the Department of Energy confirmed at the time, the Secretary would rely only on existing data-gathering forms and on the voluntary cooperation of the industry.

[14] Section 645 of the DOE Act, 42 U.S.C. § 7255, provides that, "[f]or the purpose of carrying out the provisions of this Act," the Secretary shall have the same subpoena power that the FTC has under 15 U.S.C. § 49 "with respect to all functions vested in, or transferred or delegated to, the Secretary * * * by this Act." The subpoena here, however, was issued to carry out the provisions of the PMPA, not the provisions of the DOE Act, and the subpoena itself so states. App. H, p. 42a. Similarly, the Title III study is a function vested in the Secretary by PMPA, not by the DOE Act. Adjacent sections of the DOE Act—which refer to functions "now or hereafter" vested in the Secretary, 42 U.S.C. §§ 7254, 7256(a), 7259(a)—show that Congress meant what is said when it limited the Secretary's subpoena power to functions vested "by this Act." Finally, by incorporating the FTC's subpoena authority, Congress limited the use of subpoenas to "matter[s] under investigation." 15 U.S.C. § 49. The courts have long recognized, in connection with administrative subpoenas, a "distinction between an investigative and a more general exploratory purpose * * *." *United States* v.

is that Congressional intent underlying a specific statute prevails over the terms of a more general statute that deals with the same subject matter, particularly where, as here, the more specific statute is also the later one. See, *e.g.*, *Simpson* v. *United States*, 435 U.S. 6, 15 (1978); *Brown* v. *General Services Administration*, 425 U.S. 820, 827-829 (1976); *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974); *NLRB* v. *Drivers Local Union*, 362 U.S. 274, 291-292 (1960).

B. The Secretary's Subordinate Improperly Ignored DOE Regulations Governing Administrative Review of Subpoenas.

When Exxon filed with the agency its application to quash the subpoena, Department of Energy regulations provided for a three-stage process for the administrative review of such an application. 10 C.F.R. § 205.8(h) (1978) (set forth at App. K, pp. 100a-101a).[15] The DOE employee who signed the subpoena flagrantly ignored the terms of the regulations. In response to Exxon's lengthy application, he sent a four-sentence letter asserting that "[t]here are no provisions in the DOE rules providing for such motions," that he was "unpersuaded by [Exxon's] arguments," and that he was "turning this matter over to the Office of the General Counsel" (App. G, p. 41a). The agency, however, is not free to sidestep applicable administrative procedures in this manner. *E.g.*, *Yellin* v. *United States*, 374 U.S. 109, 114-121 (1963) (a subpoena not issued in compliance with the procedural rules of the

Bisceglia, 420 U.S. 141, 152 (1975) (concurring opinion of Mr. Justice Blackmun). See also *United States* v. *Humble Oil & Refining Co.*, 488 F.2d 953 (5th Cir. 1974), *vacated*, 421 U.S. 943, *on remand*, 518 F.2d 747 (1975); *FTC* v. *Baltimore Grain Co.*, 284 F. 886 (D. Md. 1922), *affirmed per curiam*, 267 U.S. 586 (1925). The Title III study is not a "matter under investigation" for purposes of the statute.

[15] The procedure was amended in April 1979. 44 Fed. Reg. 23201-23202 (April 19, 1979).

House of Representatives was invalid); *Vitarelli* v. *Seaton*, 359 U.S. 535, 540-545 (1959); *Service* v. *Dulles*, 354 U.S. 363, 382-389 (1957).

The Court of Appeals excused the agency's failure to follow its rules in this case on the basis of a restrictive reading of Part 205's "purpose and scope" provision. It provides: "This part establishes the procedures to be utilized and identifies the sanctions that are available in proceedings before [FEA] * * *, in accordance with Parts 209 through 214 of this chapter." 10 C.F.R. § 205.1. The panel below accepted the agency's argument that, since the subpoena in this case was not issued in a proceeding under Parts 209 through 214, the administrative review procedures of Section 205.8 are inapplicable.

That conclusion is unsound for four reasons.

First, the Court of Appeals, admitting that its reading of the regulations "may not be obvious" (App. A, p. 12a), resolved the issue by invoking the principle that "an agency is entitled to very broad deference when it construes its own regulations, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) * * *." App. A, p. 12a. But the only utterance of the agency itself, as contrasted with counsel's *post hoc* arguments, is the letter from the very employee who refused to submit to the review procedure. And his "construction" amounted to this: "There are no provisions in the DOE rules providing for such motions." App. G, p. 41a.

Udall v. *Tallman* neither requires nor justifies judicial deference to a middle-level employee's unreasoned *ipse dixit* that "was no sooner made than challenged." *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 156 (1944). Even when "an agency has rendered binding, consistent, official interpretations * * * over a long period of time," *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 n. 27 (1977), this Court has always said that the "weight" given to the agency's judgment "will depend upon the

thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Under that standard, the agency's judgment here is entitled to no weight at all.

Second, the agency itself quite plainly intended the Section 205.8 procedures to apply to the review of all subpoenas, not simply those issued in proceedings under Parts 209 through 214. Neither in the original Notice of Proposed Rulemaking nor in any subsequent notice involving Section 205.8 did the agency give any hint that those salutary procedures would be inapplicable to certain categories of subpoenas. See, *e.g.*, 39 Fed. Reg. 25602 (July 11, 1974); 41 Fed. Reg. 55322 (December 20, 1976).[16]

Third, even within the four corners of Part 205 there is ample evidence that the "purpose and scope" provision of Section 205.1 is meant to be inclusive, not exclusive.[17]

[16] On the contrary, it quite properly recognized, in terms plainly applicable to all subpoenas, that administrative review is an important and effective way to avoid needless litigation:

> FEA believes that an administrative review procedure offers a fair, prompt and less formal means [than court litigation] of evaluating application[s] to quash or modify * * * subpoenas. It is intended that this administrative review will provide adequate redress for most applicants. Of course, an applicant may seek judicial intervention if aggrieved by the decision reached at the conclusion of the FEA administrative process. [41 Fed. Reg. 55323 (December 20, 1976).]

[17] For example, Section 205.15(d) makes available for inspection and copying in a public docket room *all* information "required by statute to be made available * * *." Sections 205.90-.98 apply by their terms to the filing of applications and other pleadings required or permitted under the entire *chapter* (Parts 200-699) of Title 10. Similarly, Sections 205.200-.220 establish procedures applicable to investigations under the entire chapter. If, as the Court of Appeals believed, Section 205.1 was meant to be exclusionary rather than inclusionary, these broadly applicable provisions would make no sense.

Fourth, and most important, under the Court of Appeals' theory the Department of Energy has *no* procedure available for the administrative review of the subpoena in this case. If so, that agency apparently would stand alone.[18]

Moreover, this is the first case, as far as we know, in which a Court of Appeals has sanctioned summary enforcement of an administrative subpoena when the agency refused to furnish an avenue for administrative review. The precedent is out of harmony with this Court's decisions and stands as a dangerous invitation to agencies to abandon their traditional screening function and to force subpoena recipients directly into court.

The summary subpoena enforcement procedure depends for its speed and fairness upon the availability of a meaningful opportunity for administrative review before the issuing agency. See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 653-654 (1950); *Reisman* v. *Caplin*, 375 U.S. 440, 445-449 (1964). The courts rely

[18] Our research has uncovered no other example of an agency that has subpoena power but precludes administrative review of its exercise. Most agencies have published regulations specifically governing such review. *E.g.*, 6 C.F.R. §§ 704.11-.13 (Council on Wage and Price Stability); 12 C.F.R. § 19.12(b) (Comptroller of the Currency); 12 C.F.R. § 263.7(b) (Federal Reserve System); 13 C.F.R. § 109.16(b), (d) (Small Business Administration); 14 C.F.R. § 302.19(f) (Civil Aeronautics Board); 16 C.F.R. § 3.34(c) (Federal Trade Commission); 16 C.F.R. § 1025.38(g) (Consumer Product Safety Commission); 17 C.F.R. § 10.68(c) (Commodity Futures Trading Commission); 17 C.F.R. § 201.14(b)(2) (Securities and Exchange Commission); 25 C.F.R. § 503.24(b) (Indian Claims Commission); 46 C.F.R. § 201.124 (Maritime Administration); 46 C.F.R. § 502.132 (Federal Maritime Commission); 47 C.F.R. § 1.334 (Federal Communications Commission); 49 C.F.R. § 510.4 (National Highway Traffic Safety Administration).

Even an agency that has no specific regulations for administrative review of subpoenas will entertain motions to quash. See, *e.g.*, *Comet Electronics, Inc.* v. *United States*, 381 F. Supp. 1233, 1236 (W.D. Mo. 1974), *affirmed per curiam*, 420 U.S. 999 (1975) (Interstate Commerce Commission).

on the agency to develop a record, to narrow and refine the factual and legal issues, and to resolve disputes before they even reach the courts. Thus, as this Court stated in *Morton Salt*, "[b]efore the courts will hold an order seeking information reports to be arbitrarily excessive, they may expect the supplicant to have made reasonable efforts before the Commission itself to obtain reasonable conditions." 338 U.S. at 653.

Even if, as the Court of Appeals assumed, an agency would be free deliberately to foreclose administrative review of subpoenas, that result should not be inferred upon less than the clearest indication of agency purpose. It would take a far stronger showing than what the Court of Appeals accepted to justify so significant a departure from the traditional relationship between court and agency in subpoena enforcement cases.

The question is of enormous practical importance to courts, government agencies, and the public. This Court should give it plenary consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 7, 1980

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1002

UNITED STATES OF AMERICA

v.

EXXON CORPORATION, a Corporation, APPELLANT

No. 80-1003

UNITED STATES OF AMERICA

v.

SHELL OIL COMPANY, a Corporation, APPELLANT

No. 80-1018

UNITED STATES OF AMERICA

v.

MARATHON OIL COMPANY, a Corporation, APPELLANT

Appeals from the United States District Court
for the District of Columbia

(D.C. Miscellaneous Nos. 79-0149, 79-0150, & 79-0217)

Argued February 13, 1980

Decided February 25, 1980

Donald B. Craven, with whom *Mark L. Evans* was on the brief, for appellant Exxon Corporation. *A. M. Minotti* entered an appearance for appellant Exxon Corporation. [*Sic.*]

Robert W. Steele, with whom *J. Wallace Adair* and *Robert E. Hebda* were on the brief, for appellant Shell Oil Company.

Daniel Joseph, with whom *Warren E. Connelly* and *William M. Berenson* were on the brief, for appellant Marathon Oil Company.

Thomas R. Kline and *Ann F. Cohen*, Attorneys, Department of Justice, with whom *Alice Daniel*, Assistant Attorney General, *Charles F. C. Ruff*, United States Attorney, and *William G. Kanter*, Attorney, Department of Justice, were on the brief, for appellee. *H. Robert Field*, Attorney, Office of Competition, Department of Energy, also entered an appearance for appellee.

Before WRIGHT, *Chief Judge*, BAZELON, *Senior Circuit Judge*, and WILKEY, *Circuit Judge*.

Opinion for the court *per curiam*.

Dissenting opinion filed by *Circuit Judge* WILKEY.

PER CURIAM: These are appeals from a District Court order of December 19, 1979 enforcing identical administrative subpoenas duces tecum against three oil companies: Exxon Corporation, Shell Oil Company, and Marathon Oil Company. We affirm the District Court's enforcement of the subpoenas, subject to a protective order as discussed below.

On May 9, 1978 Congress passed the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. § 2801 *et seq.* (Supp. 1979), Title III of which directs the Secretary of Energy, in consultation with the Federal Trade Commission (FTC), the Justice Department, and other appropriate agencies, to conduct a study of subsidization of wholesale and retail motor fuel sales by vertically integrated oil companies. *Id.* § 2841.[1] The Secretary delegated to the Director of the Office of Competition of the Department of Energy (DOE) his purported power to issue subpoenas to obtain information for the Title III study, and on January 22, 1979 the Director served on these appellants subpoenas for a broad range of documents related to subsidization.[2]

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[1] The Title III study, which was to be completed within 18 months of enactment, is to cover the following subjects:

> (1) the role of vertically integrated operations in facilitating subsidization of sales of motor fuel at wholesale or retail;
>
> (2) the extent to which such subsidization is predatory and presents a threat to competition;
>
> (3) the profitability of various segments of the petroleum industry;
>
> (4) the impact of prohibiting such subsidization on the competitive viability of various segments of the petroleum industry, on prices of motor fuel to consumers and on the health and structure of the petroleum industry as a whole; and
>
> (5) such other matters as the Secretary considers appropriate.

15 U.S.C.A. § 2841(b) (Supp. 1979).

[2] The subpoenas are set out in the Joint Appendix at 24-38.

Appellants have challenged the subpoenas on several grounds, most notably: (1) DOE's subpoena power under Title III can derive only from Title III itself, the language of which is silent on subpoena power, and the legislative history of which demonstrates congressional intent that DOE have no subpoena power for the Title III study. (2) The general grants of subpoena power to DOE in the Department of Energy Organization Act (DOEOA), 42 U.S.C. § 7101 *et seq.* (Supp. I 1977), and the Federal Energy Administration Act (FEAA), 15 U.S.C. § 761 *et seq.* (Supp. I 1977), cannot provide subpoena power for an agency function which, like the subsidization study, stands outside and was mandated subsequent to these general acts. (3) Even if the general grant of subpoena power under the DOEOA, 42 U.S.C. § 7255 (Supp. I 1977), could apply to a later-mandated agency function, that section, which incorporates the subpoena power granted the FTC under 15 U.S.C. § 49 (1976), applies only to narrowly focused agency investigations of specific legal violations, not open-ended studies. (4) In denying administrative review of the subpoenas, DOE violated its own regulations, the Administrative Procedure Act, and the due process clause. (5) The subpoenas are too broad and burdensome to meet the demands of legitimate purpose and relevancy.

Judge Penn rejected the oil companies' claims, holding that DOE had subpoena power for the Title III study under DOEOA. We agree. Title III of PMPA rather obviously makes no provision for subpoena power for the subsidization study.[3] Our analysis of DOEOA, however, reveals that DOE did not need a special grant of subpoena power for this specific study. Rather, Title III

[3] On the other hand, Title II of PMPA, which sets standards for accurate disclosure of motor fuel octane ratings, does expressly grant subpoena power to the FTC. 15 U.S.C.A. § 2823(a) (Supp. 1979).

specifically *instructs* DOE to conduct a study which the agency would in any event *be permitted* to conduct under its broad general DOEOA mandate. Thus, DOE can rely on the subpoena power in Section 7255.[4] We address this issue first, because it lays the premise for our analysis of the oil companies' legislative history argument.

DOEOA provides in 42 U.S.C. § 7255:

> For the purpose of carrying out the provisions of this chapter, the Secretary, or his duly authorized agent or agents, shall have the same powers and authorities as the Federal Trade Commission under Section 49 of Title 15 [the FTC's subpoena power] with respect to all functions vested in, or transferred or delegated to, the Secretary or such agents by this chapter.

In creating DOE, Congress expressly sought to achieve effective management of energy resources, promote consumer interests by ensuring an ample and reasonably priced supply of energy, and foster the economic health of small businesses engaged in energy production. *Id.* § 7112. The statute mandates appointment of eight Assistant Secretaries with such responsibilities as promoting competition and setting regulations for consumer protection. *Id.* § 7133(a)(7). The Secretary must create an Energy Information Administration (EIA) for

> carrying out a central, comprehensive, and unified data and information program which will collect, evaluate, assemble, analyze, and disseminate data and information which is relevant to energy re-

[4] So holding, we agree with the District Court that there is thus no need to answer the somewhat more involved question whether FEAA provides yet another source of this subpoena power.

> source reserves, energy production, demand, and technology, and related economic and statistical information, or which is relevant to the adequacy of energy resources to meet demands in the near and longer term future for the Nation's economic and social needs.

Id. § 7135(a)(2). The statute also vests the EIA Administrator with the very broad duties the FEAA had assigned to the Administrator of the Office of Energy Information Administration under 15 U.S.C. § 790 *et seq.* (Supp. I 1977), including the task of maintaining information on the economic structure of energy supply systems. *Id.* § 790a(b). Finally, the DOEOA requires the Secretary to make an annual report on the effectiveness of competitive and regulatory practices of government and private entities. 42 U.S.C. § 7267(5) (Supp. I 1977).

The specific study required by Title III falls well within the range of administrative inquiry which these provisions of DOEOA place within DOE's power. We find no reason why the phrase "by this chapter" in Section 7255 cannot include an agency function lying within the powers granted by that chapter, but reinforced by a specific subsequent legislative mandate. Thus, DOE's performance of the Title III study is a legitimate means of "carrying out the provisions of this chapter" within the meaning of Section 7255.

Since DOE thus already possessed subpoena power for a general study of subsidization when Congress passed Title III, that statute's silence on subpoena power would seem to be of no consequence; Congress would have had to build into Title III a clear withdrawal of subpoena power if it did not want DOE to issue subpoenas for the Title III study. The oil companies point to the legislative history of Title III and to grants of subpoena power in related legislation to argue that Congress intended to do just that. We disagree.

The heart of the legislative history argument is a pair of remarks by Senator Bumpers, the sponsor of Title III. The remarks arose during debate on a proposed amendment to Title III offered by Senator Kennedy. That amendment, incorporating the confidentiality section of the Energy Supply and Coordination Act, 15 U.S.C. § 796(d) (Supp. I 1977), would have barred disclosure of certain information DOE obtained from the oil companies as confidential, except for requiring disclosure upon request to the Justice Department, the FTC, and other listed agencies. Senator Bumpers objected vigoronsly to the Kennedy amendment, apparently construing it as giving these other agencies access which they would otherwise lack to DOE-obtained information. Senator Bumpers believed that the oil companies' fear of adverse use of such information by the other agencies would chill their willingness to voluntarily comply with DOE requests for Title III information. Apparently, he felt that such voluntary compliance was crucial because he assumed that DOE would have no subpoena power under Title III. *See* 124 CONG. REC. S7155 (daily ed. May 9, 1978).[5]

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[5] Senator Bumpers' key remarks were as follows:

> * * * The Justice Department has subpena powers. If they are sure that something is going on that is wrong among major oil companies, they can subpena the information. They do not have to request it. They do not have to ask for their cooperation. Here we do. * * *
>
> * * * *
>
> * * * [Kennedy's] amendment has nothing to do with what kind of energy information [the other agencies] will get. They will get no more information under his amendment than under mine. They will not have the right to get the information under subpena powers either way. * * *

124 CONG. REC. S7155, cols. 1, 2 (daily ed. May 9, 1978).

The debate on the Kennedy amendment is clouded by confusion on both sides as to what changes the amendment would make in the status quo. Despite this confusion, it does appear clear that Senator Bumpers thought there would be no subpoena power under Title III. Nevertheless, we do not see how Senator Bumpers' express or implied view can alter our own view of DOE's general subpoena power here. First, "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). Second, even if Senator Bumpers did believe that DOE would have no subpoena power under Title III, that belief was really unnecessary to his argument against the Kennedy amendment. Senator Bumpers wanted to encourage voluntary compliance with Title III. Under the severe time constraints Title III was to impose on DOE, voluntary compliance would be extremely desirable, even if DOE retained a fall-back subpoena power. Therefore, the context of Senator Bumpers' remarks weakens their significance as evidence of intent on the subpoena issue. Moreover, the fact that his assumption that DOE would have no subpoena power was unnecessary to his position on the Kennedy amendment may explain why no Senators rose to challenge that assumption; it was simply not centrally relevant to the debate. In fact, so far from believing the goal of voluntary compliance and the presence of a residual subpoena power inconsistent, Congress may well have thought the two complementary. Since the focus of the Title III study is the possibility of predatory subsidization of motor fuel sales by the oil companies, Congress may have assumed the residual subpoena power to be necessary to encourage agreements effecting voluntary compliance. Without the brooding threat of such subpoena power, Congress might reasonably have feared that the oil companies' willingness to participate in the study would be less than overwhelming.

The oil companies nevertheless invoke the hoary principle of *expressio unius est exclusio alterius* to buttress their view of congressional intent. First, whereas Title III of PMPA never mentions subpoena power, Title II, which requires accurate disclosures of motor fuel octane ratings, expressly grants subpoena power to the FTC. 15 U.S.C.A. § 2823(a) (Supp. 1979). Second, Congress expressly gave subpoena power to the DOE itself in such other specific statutes as the Powerplant and Industrial Fuel Use Act, 42 U.S.C.A. § 301 *et seq.* (Supp. 1979), and the Emergency Energy Conservation Act of 1979, Pub. L. No. 96-102.

These congressional actions might, among many other factors, provide some evidence on the issue of congressional intent, but they are hardly decisive. The structure of Title II differs markedly from that of Title III. Title II is primarily a directive to *private* parties to fulfill general reporting requirements imposed by the Act. Title II, however, secondarily establishes the FTC as the enforcing agency, and Congress may have felt a need to spell out the FTC's enforcement powers in some detail. Title III, in contrast, is primarily a directive to a government agency, the Department of Energy, and Congress may reasonably have understood Title III to incorporate DOE's general enforcement powers from the DOEOA.

As for the Powerplant and Energy Conservation Acts, the grants of subpoena power there may well have been the product of "uncertainty, understandable caution, and a desire to avoid litigation." *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 696 (D.C. Cir. 1973). The oil companies' *expressio unius* argument remains highly speculative. Moreover, since Section 7255 had already given DOE subpoena power for a study like that directed in Title III, for us to accept the oil companies' argument we would have to read the combination of their

legislative history and *expressio unius* theories as proof of repeal or amendment by implication. The Supreme Court has cast grave doubt on such inferences, *TVA v. Hill*, 437 U.S. 153, 189-190 (1978), and its suspicions would be especially justified here where the inference would be based not on any language in Title III itself, but on a stray remark in the legislative history and questionable reference to other statutes.

The oil companies nevertheless argue that 15 U.S.C. § 49 (1976), the FTC Act provision on which the Section 7255 subpoena power is based, allows the agency to issue subpoenas only as part of narrowly focused investigations of specific parties suspected of specific legal violations, and not as part of broad inquiries into the possibility of legal violations throughout an industry or into industry conduct not currently illegal which might warrant fresh administrative or legislative action. We find nothing in the FTC Act or in the judicial history of Section 49 or Section 7255 to support this distinction.

The key provision in the FTC Act states:

> For the purposes of this subchapter the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. * * *

15 U.S.C. § 49 (1976). Although the section might put some limit on FTC orders of access, the rather laconic phrase "relating to any matter under investigation" describing the scope of the subpoena power hardly suggests the study-investigation distinction argued by the oil companies. Moreover, the language of other related sections

of the FTC Act argues directly against this distinction. Section 46, in granting substantive powers to the FTC, clearly uses the verb "investigate" to describe broad administrative functions involving studies or inquiries which logic would force the oil companies to place on the "study" rather than on the "investigation" side of their distinction. *See id.* § 46(a), (h).

Moreover, of the numerous cases cited by the oil companies to support their distinction, none is on point. Some involve judicial construction of the very particular terms of a wholly different statute, like the Internal Revenue Code. *United States v. Bisceglia*, 420 U.S. 141 (1975); *United States v. Humble Oil & Refining Co.*, 488 F.2d 953 (5th Cir. 1974), *vacated*, 421 U.S. 943 (1975), *reinstated on remand*, 518 F.2d 747 (5th Cir. 1975). Other cited cases simply uphold subpoenas issued pursuant to law enforcement investigations without judging the validity of subpoenas issued for other purposes. *United States v. Bell*, 564 F.2d 953 (TECA 1977); *United States v. Empire Gas Corp.*, 547 F.2d 1147 (TECA 1976), *cert. denied*, 430 U.S. 915 (1977). And *FTC v. Baltimore Grain Co.*, 284 F. 886 (D. Md. 1922), *aff'd per curiam*, 267 U.S. 586 (1925), involved not a subpoena, but an order of access.

To the extent that these cases might accumulate into some amorphous general congressional belief in the study-investigation distinction, they are easily offset by numerous cases cited by DOE which suggest, at least generally, the absence of such a distinction. With no controlling precedent, we revert to the language and scheme of the FTC Act, and find no grounds for the oil companies' theory.[6]

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[6] Appellants also rely on our recent decision in *United States v. Iannone*, 610 F.2d 943 (D.C. Cir. 1979), as support for limiting DOE's general subpoena powers. We find the case easily distinguishable. In *Iannone*, Congress had given

The oil companies' procedural objections to the subpoena merit little attention. Appellants claim that under the DOE regulations for review of agency subpoenas, 10 C.F.R. § 205.8 (1979), DOE was required to entertain their motion to quash. DOE points in response to Section 205.1 of the regulations, which purportedly limits the subpoena review regulations to subpoenas issued as part of the specific agency functions described in 10 C.F.R. §§ 209-214 (1979), into none of which categories falls the subsidization study. Whether the reference to Sections 209-214 in Section 205.1 is inclusive or exclusive may not be obvious, but an agency is entitled to very broad deference when it construes its own regulations, *Udall v. Tallman*, 380 U.S. 1, 16 (1965), and we see no reason to disagree with DOE here.

As for other procedural arguments, the oil companies offer no sound authority for their view that either the Administrative Procedure Act or due process requires the agency to promulgate review regulations for all agency subpoenas. *See United States v. Firestone Tire & Rubber*

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the Inspector General of DOE express power to subpoena documents but was silent on his power to subpoena live testimony. We held that grant of power to subpoena documents to be exclusive. There, however, we had a clear and focused expression of congressional intent with respect to the subpoena powers of a particular official. Moreover, our concern lay not with the general scope of DOE's subpoena power, but with problems of delegation of that power to that particular official. First, the Inspector General is supposed to be an independent officer within DOE, not an "agent" of the Secretary within the meaning of 42 U.S.C. § 7255. 610 F.2d at 946. Second, Congress has sought to create a comprehensive system of Inspectors General throughout the government, all with identical powers. Varying grants of subpoena authority to Inspectors General from agency heads would disrupt such a system. Plainly, none of the considerations in *Iannone* bear on this case.

Co., 455 F.Supp. 1072, 1080 (D. D.C. 1978). *Northern California Power Agency v. Morton*, 396 F.Supp. 1187 (D. D.C. 1975), on which the oil companies rely, did not involve subpoenas, but complex ratemaking matters which, in the court's view, required regulations to help the parties obtain review of massive technical data. Moreover, in that case court review would be limited to the agency record, which the court thought would be enhanced by new regulations. In a subpoena enforcement, by contrast, the District Court can inquire into all relevant matters, unlimited by the scope of the agency's own inquiry, if any. In any event, we find no evidence that the oil company did not have a reasonable hearing on its challenges to the subpoenas in the District Court, and so we find no reason to impose new procedural rules on the agency.[7]

Finally, we find that the subpoenas were reasonably relevant to the agency's legitimate statutory purpose and imposed no undue burden on the oil companies. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946). Marathon makes the rather novel argument that the Secretary should first collect documents on subsidization and only if he finds evidence of this practice proceed to seek information on the possibly predatory motive behind it. But nothing in the statute or its legislative history suggests in any way that Congress intended

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[7] We find no merit and little coherence in Shell's claim that the District Court erred in denying it discovery in the enforcement proceeding, and in reaching the merits of the subpoena question in denying Shell's motion to dismiss, before Shell filed an answer. Except in extraordinary circumstances of the sort that are not apparent here, discovery is improper in a summary subpoena enforcement proceeding, *United States v. Firestone Tire & Rubber Co.*, 455 F.Supp. 1072, 1078 (D. D.C. 1978), and Shell appears to have had ample opportunity to present the District Court with all its objections to the subpoenas.

this study to be conducted in stages; its tight deadline suggests quite the contrary.

We thus conclude that as a matter of law the DOE acted within its statutory power in issuing the Title III subpoenas. Nevertheless, we uphold their enforcement subject to the precise terms of a protective order. Since the enforcement of a subpoena is an independent judicial action, and not merely an action ancillary to an earlier agency action, *ICC v. Brimson*, 154 U.S. 447 (1894), a court is free to change the terms of an agency subpoena as it sees fit. *Flotill Products, Inc. v. FTC*, 278 F.2d 850, 852 (9th Cir. 1960).

DOE originally issued subpoenas to nine oil companies, including, in addition to the appellants, Ashland Oil Company, Atlantic Richfield Oil Company, Clark Oil & Refining Company, Gulf Oil Corporation, Standard Oil Company of Indiana, and Texaco, Inc. These latter six companies, however, avoided enforcement of the subpoenas by coming to agreements with DOE providing for voluntary submission of documents relevant to the Title III study with special protection for certain documents designated by the companies as "confidential" or "extremely confidential." Under these agreements, "confidential" documents in DOE hands would remain in special locked files, while "extremely confidential" documents would generally remain in the companies' possession and thus never become agency records subject to public disclosure under the Freedom of Information Act. The gist of these protections is set out in the attached Protective Order. In settling with the six other companies, DOE apparently believed that these protections put no serious constraints on the Title III study. DOE has not shown any reason why the appellants do not need similar protection, and in fact, in an effort at settling after oral argument in this case, expressly offered equivalent confidentiality terms to appellants. We therefore find it appropriate to modify the

subpoenas to incorporate the essential confidentiality provisions of these earlier agreements.[8]

Subject to the attached Protective Order, the judgment of the District Court is

Affirmed.

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[8] The attached Protective Order is essentially the one submitted by DOE as part of its effort to settle the case after oral argument in this court. The government's settlement proposal appears to differ from the agreements reached with the nonlitigating oil companies in only two material ways, and we must presume it was these differences which deterred the appellants from settling.

First, the government did not offer the appellants, as it did the nonlitigating companies, assurance that it would not exercise any discretion it possessed under *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), to release to the public any information otherwise exempt under the Freedom of Information Act. We think the public interest is not disserved by providing appellants this protection, so we include it in the Protective Order.

Second, the earlier agreements had provided that if DOE shares any of its Title III information with the Justice Department or the FTC, those agencies are bound not to use such information—unless it is elsewhere available—for any purpose other than that of Title III itself. The nonlitigating oil companies thus obtained assurance that the other agencies could not use any such information as the basis for any independent legal actions against them. After those agreements were drawn, DOE received complaints from the Justice Department and the FTC that such provisions, forcing them to read Title III documents with one eye closed, so to speak, unduly inhibit them in their statutory law enforcement duties and were not in any event required by law. We agree. Appellants have not alerted us to any authority, either in general or in the text or legislative history of PMPA, for requiring such extraordinary protection. Thus, we are loath to make such protection part of our Protective Order, especially since Title III expressly provides for consultation between DOE and other agencies.

PROTECTIVE ORDER

I. Production of Documents.

By March 3, 1980 Exxon Corporation, Shell Oil Company, and Marathon Oil Company (hereinafter referred to as company) shall produce all documents specified in the subpoenas issued on January 22, 1979 by William C. Lane, Jr. of the Department of Energy (DOE), subject to the provisions for confidential treatment set forth below.

II. Confidentiality

(A) Each company shall designate in good faith at the time of production of documents or information pursuant to this Protective Order those items that it claims to be "Confidential" in that they contain proprietary, trade secret, or other confidential information. Each company may also designate a reasonable number of documents and information each company deems to be "Extremely Confidential" in that they contain proprietary, trade secret, or other confidential information of such a significant and confidential nature that their release may have an extremely adverse effect on the company's competitive business position. A designation by each company as "Confidential" or "Extremely Confidential" is not a declaration of the agency of such designation. Documents designated by being "Extremely Confidential" shall be made available for examination by personnel assigned to the Title III study from the Office of Competition (O/C), the Department of Justice (DOJ), the Federal Trade Commission (FTC), and any other agency as designated by the Secretary for participation in the Title III study at the offices designated by each company in Washington, D.C. In the event any of the above-listed agencies reasonably determines that physical possession of a copy of a document labeled "Extremely Confidential" is necessary, those agencies may make a request for such a copy, which request the company shall not unreasonably refuse.

(B) In the event that copies are made of, or notes are taken concerning, such "Extremely Confidential" documents by any person examining the documents, such copies and notes shall be treated as "Extremely Confidential" documents within the meaning of that term as it is used in this Protective Order.

(C) In the event that O/C, DOJ, FTC, or any other agency designated by the Secretary for participation in the Title III study determines that physical possession of the notes from, or a copy of, a company document labeled "Extremely Confidential" is necessary for the completion of the Title III study, pursuant to Subparts (A) and (B) of this Part, or if, upon examination of such documents for Title III purposes, another law enforcement purpose is evident, such document may be requested for such use. If so requested, such agency shall provide the following continuing protections for the confidentiality of such notes or documents, as well as for documents labeled "Confidential" or notes taken from such "Confidential" documents:

(1) All such documents and notes, as well as drafts and manuscripts of the Title III study, shall be secured in a locked file cabinet when not in use and in a room which is locked when not in use or such other facilities as will provide comparable security.

(2) A log, available to the company upon request, shall be maintained by all individuals that have access to "Confidential" documents of that company.

(3) A separate log, available to the company upon request, shall be maintained for "Extremely Confidential" documents which shall show on a document-by-document basis who has possession of such document.

(4) Individuals granted access to "Confidential" or "Extremely Confidential" documents of a company shall be informed of the status of these

documents and the limitations on their use and such individuals, other than attorneys employed by O/C, DOJ, FTC, and other agencies designated by the Secretary for participation in the Title III study, shall sign an acknowledgment of their understanding of these limitations in the form attached as Exhibit A. A copy of the executed undertaking shall be made available to the company.

(5) All "Confidential" and "Extremely Confidential" material shall be returned to said locked file cabinets at the end of each working day.

(D) In the event O/C, FTC, or any other agency designated by the Secretary for participation in the Title III study determines that any of a company's documents labeled "Extremely Confidential" are not necessary to the Title III study, that agency shall immediately return such documents to the company. Provided, however, that if upon examination of such document for Title III purposes another law enforcement purpose is evident, such document may be kept for such use.

(E) Any government agency having possession of documents produced under this Protective Order may share those documents with any other government agency that agrees to abide by the terms of this Protective Order.

(F) Nothing in the Protective Order shall be construed as precluding or limiting disclosure:

(1) pursuant to a valid subpoena or court order;

(2) pursuant to a request formally authorized by a committee or subcommittee of Congress with jurisdiction over the subject matter of the documents or information requested;

(3) at the direction of the Office of Management and Budget under 44 U.S.C. § 3502 *et seq.*

(G) Any agency having possession of any documents obtained under this Protective Order shall promptly notify a company of all requests for disclosure under the Freedom of Information Act of any document or information produced by a company under this Protective Order, including requests for disclosure that would be permitted hereunder, and the basis therefor, and shall also give the company the maximum actual notice reasonably possible, and not less than ten days' notice (unless compelled by court order or lawful subpoena to disclose the document in less than ten days), of any intended disclosure. The notice period shall run from the date on which the company actually receives such written notice. No agency shall exercise any discretion it may have under the Freedom of Information Act to release otherwise exempt material provided by any company.

(H) Portions of the draft report on the Title III study which contain or summarize information from "Confidential" or "Extremely Confidential" documents shall be treated in the same manner as other "Confidential" or "Extremely Confidential" documents under this Protective Order. In addition, O/C will send to a company those portions of the final draft of such report which cite or summarize "Confidential" or "Extremely Confidential" documents at least ten days prior to public release of the report and provide the company with an opportunity to comment on O/C's intended use prior to release of such report.

(I) At the conclusion of O/C's Title III study, any agency in possession of any documents obtained under this Protective Order shall immediately return to a company all documents or information produced by that company pursuant to this Protective Order (and all copies of such documents or information) which are not referenced in or relied upon to prepare the Title III study or which are not, having been examined for the Title III study, necessary for a law enforcement purpose. In any event,

all documents will be returned to a company within four (4) years from the completion of the Title III study unless being kept for a law enforcement purpose.

(1) All documents and information not immediately returned or released to a company pursuant to Subpart (I) of this Part shall continue to be maintained by the agency in possession in the same manner as provided in Subpart (C) of this Part until returned.

(2) All notes taken from a company document labeled "Extremely Confidential" shall be destroyed by the agency in possession when the report of the Title III study is submitted to Congress, unless being kept for a law enforcement purpose.

(J) O/C, DOJ, FTC, or any other government agency designated by the Secretary may request and a company shall not unreasonably refuse the reclassification of any material designated either "Confidential" or "Extremely Confidential" which the agency believes may have been wrongly classified or which the passage of time may have made less sensitive. Such request of an agency shall specifically state the reasons for the request, including the intended use thereof.

(K) A company shall inform O/C of the person authorized to receive notification under this Protective Order.

EXHIBIT A

STATEMENT

_____ hereby states:
(Name)

I reside at _____
(Street Adress)

in the City of _____,
(Name of City)

County of _____
(Name of County)

_____ in the _____
(Capacity) (Department or Agency)

I understand that I will have access to and be examining corporate documents of _____
(Company)
which are of a highly proprietary and confidential nature, and pledge that I, under no circumstances, shall remove any such confidential document from the control of _____. Furthermore, I have
(Government Agency)
read the Protective Order covering these documents and understand the limitations contained therein on the use of information contained in those documents. I further understand that violation of the terms of the Protective Order may subject me to severe penalties under 18 U.S.C. § 1905, including fines and imprisonment.

Dated: _____ _____

WILKEY, *Circuit Judge*, dissenting: This case deserves, and has received, all possible expedition, so I record my disagreement with my colleagues' conclusion with unaccustomed brevity. I think the appellants are correct in their challenge to the subpoenas on points (1), (2), and (5) as stated in the third paragraph of the Per Curiam. On the face of the statute there is no subpoena power under Title III, there is admittedly not one word in the legislative history implying there is such a power, and there are words from two of the legislators most active on this statute saying flatly that no subpoena power exists for the Title III study, a repeated assertion which was repeatedly uncontradicted.

I agree, of course, with the imposition of the protective order.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

Miscellaneous No. 79-0149

No. 80-1002

UNITED STATES OF AMERICA

v.

EXXON CORPORATION, a Corporation, APPELLANT

No. 80-1003

UNITED STATES OF AMERICA

v.

SHELL OIL COMPANY, a Corporation, APPELLANT

No. 80-1018

UNITED STATES OF AMERICA

v.

MARATHON OIL COMPANY, a Corporation, APPELLANT

Appeals from the United States District Court
for the District of Columbia

Before: WRIGHT, Chief Judge, BAZELON, Senior Circuit Judge, and WILKEY, Circuit Judge

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is hereby affirmed, for the reasons set forth in the Opinion for the Court filed in these cases on February 25, 1980, as amended, subject to the protective order attached hereto as Schedule I and which is fully incorporated herein.

Per Curiam

For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Filed: February 26, 1980

Opinion for the Court *per curiam.*

Dissenting opinion filed by Circuit Judge Wilkey in which he notes his disagreement with the disposition of this case on the merits but agrees with the imposition of the protective order.

[Protective Order omitted. It is set forth as part of Appendix A, *supra*, pp. 16a-21a.]

APPENDIX C

UNITED STATES COURT 0F APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

Misc. No. 79-0149

No. 80-1002

UNITED STATES OF AMERICA

v.

EXXON CORPORATION, a Corporation, APPELLANT

And Consolidated Case Nos. 80-1003 and 80-1018

Filed Feb. 29, 1980

Before: WRIGHT, Chief Judge; BAZELON, Senior Circuit Judge; and WILKEY, Circuit Judge

ORDER

Upon consideration of appellants' motions for stay of mandate, of the motions for expedited consideration of same, and of appellee's opposition to the requested stays of mandate, it is

ORDERED, by the Court, that the motions for expedited consideration of the requests for stay of mandate are granted, and it is

FURTHER ORDERED, by the Court, that appellants' motions for stay of mandate are granted to and including March 10, 1980, on which date the Clerk is directed to issue the mandate in these cases.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 79-0149

Filed Dec. 19, 1979

UNITED STATES OF AMERICA,
c/o U.S. Attorney,
Courthouse Building,
Washington, D.C. 20001, PETITIONER

v.

EXXON CORPORATION, a Corporation,
c/o C. T. Corporation System,
918 - 16th St., N.W.,
Washington, D.C. 20006, RESPONDENT

ORDER

Petitioner, the United States of America, having invoked the aid of the Court, pursuant to Section 645 of the Department of Energy Organization Act, 42 U.S.C.A. Section 7255 and Section 13(e) of the Federal Energy Administration Act, 15 U.S.C. Section 772(e) (1976), in requiring the above-captioned respondent to comply with the administrative subpoena *duces tecum* issued on January 22, 1979, to obtain information for a study being conducted pursuant to Title III of the Petroleum Marketing Practices Act, Public Law 95-297, 15 U.S.C.A. §§ 2801 *et seq.* and the Court having considered the Petition and other papers of record, and the Court being of the opinion that the subpoena was lawfully issued for an inquiry within the authority of the agency; the demand is not too indefinite, and the information sought is reasonably rele-

vant, and therefore the subpoena should be enforced, it is hereby

ORDERED that respondent Exxon appear before William C. Lane, Jr., the Director of the Office of Competition of the Office of Policy and Evaluation of the Department of Energy or his representative at a time and place in Washington, D.C., to be designated by the petitioner upon not less than ten (10) days' notice, and produce documents as required by the subpoena *duces tecum* issued by William C. Lane, Jr., on January 22, 1979, a copy of which subpoena is attached to the Petition.

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

December 17, 1979

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. 79-149

UNITED STATES OF AMERICA

v.

EXXON CORPORATION

Misc. 79-150

UNITED STATES OF AMERICA

v.

SHELL OIL CO.

Misc. 79-217

UNITED STATES OF AMERICA

v.

MARATHON OIL CO.

Filed Jan. 15, 1980

MEMORANDUM

These three cases came before the Court on petitions by the United States to enforce subpoenas duces tecum dated January 22, 1979, and served on the three respondents, Exxon Corporation (Exxon), Marathan [*sic*] Oil Co. (Marathon), and Shell Oil Co. (Shell). Petitioner filed these actions when the respondents failed to honor the subpoenas.[1, 2] The Court heard arguments in support of and in opposition to the respective petitions and on December 17, 1979, entered Orders directing the respondents to comply with the subpoenas. The purpose of this Memorandum is to briefly set forth the basis of the Court's ruling.

Petitioner brings these actions pursuant to the authority granted by the Department of Energy Organization Act (DOEOA), 42 U.S.C. § 7101 *et. seq.*, and the Federal Energy Administration Act (FEAA), 15 U.S.C. § 761 *et. seq.* The subpoenas were issued by the Director of the Office of Policy and Evaluation, acting under a delegation of authority from the Secretary of the Department of Energy, to require the respondents to provide information necessary for the preparation of a study required by Title III of the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. § 2841. Section 2841(a) provides:

> (a) The Secretary of Energy, in consultation with the Chairman of the Federal Trade Commission and the Attorney General and other agencies as the Secretary deems appropriate, shall conduct a study of

[1] The actions against Exxon and Shell were filed on June 29, 1979, and the action against Marthon [*sic*] was filed on October 10, 1979.

[2] Similar subpoenas have been served on several other oil companies which voluntarily complied after negotiations with the Department of Energy.

> the extent to which producers, refiners, and other suppliers of motor fuel subsidize the sale of such motor fuel at retail or wholesale with profits obtained from other operations.

Section 2841(b) provides that the study shall examine the role of vertically integrated operations in facilitating subsidization of sales of motor fuel at wholesale or retail, the extent to which such subsidization is predatory and presents a threat to competition, the profitability of various segments of the petroleum industry, the impact of prohibiting such subsidization on the competitive viability of segments of the industry, the prices of motor fuel to consumers and the health and structure of the industry as a whole and such other matters as the Secretary deems appropriate. The Secretary plans to submit his report on March 31, 1980.[3]

I

Respondents object to the subpoenas on several grounds, namely, (1) that the PMPA does not confer subpoena power, (2) Congress did not intend to confer subpoena power upon the Department of Energy (DOE) for completion of the study required by PMPA, (3) the DOE cannot look to other statutes for subpoena power, including the DOEOA and the FEAA and (4) DOE may not use its investigatory powers under FEAA and DOEOA to fulfill its responsibilities under Title II of the PMPA. Respondents also attack the subpoenas on a number of procedural grounds. After giving careful consideration to the arguments of respondents, this Court concludes that they are without merit and that the subpoenas should be enforced.

[3] The report was originally due on December 19, 1979, but was extended due to various delays in obtaining information.

The petitioner concedes that the PMPA, standing alone, does not grant DOE the power to subpoena the information sought by that agency. However, petitioner argues and the Court agrees, that such authority is granted by the DOEOA and, at least arguably, by the FEAA. There is nothing in the PMPA or its legislative history which suggests that by enacting the PMPA, Congress acted to limit or prohibit the use of subpoenas. Such an argument would necessarily be based on a contention that the PMPA, having made no mention of subpoenas, necessarily amended the DOEOA and the FEAA by implication. As noted above, the Court finds nothing to support that contention and, in any event, amendments by implication are not favored. *See United States* v. *Weldon*, 377 U.S. 95, 103, n. 12 (1964). Moreover, to accept respondents' argument in this regard, would be to hold that every time Congress ordered DOE to perform a study pursuant to its authority under DOEOA, a special direction affirming the subpoena power would be necessary. The respondents have offered no argument or rationale which would support such a contention.

The power to issue the subpoenas is found in the DOEOA. In its declaration of purposes in creating the DOE, Congress noted that it sought to, among other things, achieve an effective management of energy functions, promote the interests of consumers through the provision of an adequate and reliable supply of energy at the lowest reasonable cost, and foster, insofar as possible, the good health of the nation's small business firms, private cooperatives and others involved in energy production. *See* 42 U.S.C. § 7112. In order to achieve those objectives, the statute provided for the appointment of eight Assistant Secretaries and included in their assigned responsibilities the task of reviewing competition and consumer affairs including the promotion of competition in the energy industry, protection of the consuming public

in the energy policy making processes, and formulation and analysis of policies, rules, and regulation relating to competition and consumer affairs. *See* 42 U.S.C. § 7133 (a) (7). The statute also provides for the establishment of an agency information administration and provides that the Secretary of DOE shall delegate to the administrator the responsibility for the gathering, analysis and dissemination of energy information. *See* 42 U.S.C. § 7135 (b). Finally, the DOEOA provides that the Secretary shall make an annual report to include a review and appraisal of the adequacy and appropriateness of the techniques, procedures and practices, including competitive and regulatory practices, employed by federal, state and local governments and non-governmental entities to achieve the purposes of the DOEOA. *See* 42 U.S.C. § 7267(5).

Taking all of the above objectives into consideration, it is easily discerned that the study required to be performed by DOE by the PMPA, see 15 U.S.C. § 2841, is well within the authority and powers granted to DOE by the DOEOA. Thus, in performing the study required by the PMPA, the Secretary is merely performing a function required of him under the DOEOA. Thus the subpoenas which make reference to the study required under PMPA set forth a valid purpose.

II

The authority to issue the subpoenas now challenged by the respondents is found in 42 U.S.C. § 7255 which provides:

> For the purpose of carrying out the provisions of this chapter, the Secretary, or his duly authorized agent or agents, shall have the same powers and authorities as the Federal Trade Commission under Section 49 of Title 15 with respect to all functions

vested in, or transferred or delegated to, the Secretary or such agents by this chapter.

The Court concludes that the subpoena power is broad and would encompass the study required by the PMPA.

Respondents argue that the authority under Section 7255 is restricted to investigations and not studies since a similar restriction limits the Federal Trade Commission. See 15 U.S.C. § 49. In this Court's view, the authority granted under Section 7255 is the same as that granted by 15 U.S.C. § 49 without any limitation as to investigation. Section 7255 clearly provides that the subpoena power is provided to the Secretary, "[f]or the purpose of carrying out the provisions [of the DOEOA]". *See also,* S. Rep. No. 95-164, 95th Cong. 1st Sess., *reprinted in* [1977] U.S. Code Cong. & Ad. News 854, 904.

While concluding that the authority to issue the subpoenas is clearly set forth in the DOEOA, the Court notes that the authority contained in the FEAA, *see* 15 U.S.C. § 772(b), appears to be limited to those situations where organizations are required to make reports. Having found that the authority is contained in the DOEOA, the Court need not discuss the authority or limitations contained in the FEAA as they relate to these subpoenas.

III

Respondents also challenge the subpoenas as being invalid because DOE allegedly failed to follow its own regulations for resolving disputes over subpoenas and that it failed to comply with the Administrative Procedure Act (APA).

Respondents contend that 10 CFR § 205.8 applies to the issuance of the subject subpoenas and that since DOE did not follow the requirements of that regulation the subpoenas are unenforceable. That regulation sets forth

an administrative procedure for rulings on objections on motions to quash subpoenas. The argument is without merit since 10 CFR § 205.0 provides that the provisions set forth in the above regulation applies to those procedures set forth in 10 CFR Parts 209 through 214. Those sections relate to International Voluntary Agreements (Part 209), General Allocation and Price Rules (Part 210), Mandatory Petroleum Allocation Regulations (Part 211), Mandatory Petroleum Price Regulations (Part 212), Oil Import Regulations (Part 213), and Mandatory Canadian Crude Oil Allocation Regulations (Part 214). Furthermore, the Court finds no merit in the respondents due process arguments since the subpoenas issued only affect the respondents when the Court orders enforcement.

The respondents arguments made pursuant to the APA, specifically 5 U.S.C. §§ 552 and 555 are likewise found to be without merit.

IV

This Court is satisfied that the subpoenas were properly issued pursuant to the DOEOA for a lawful purpose, that the study for the purposes of PMPA is one which falls within the authority granted under the DOEOA, that the subpoenas are not burdensome or unreasonable in view of the information sought and the requirements of the PMPA[4] and that the understandable concern of the respondents respecting confidentiality of their records is met by the order which provides for at least 10 days notice before any documents must be produced.

Having carefully considered the arguments of the respondents, and having found those arguments without

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[4] Respondents have failed to show that the subpoenas are burdensome or unreasonable. *See FTC* v. *Texaco, Inc.*, 180 U.S. App. D.C. 390, 555 F.2d 862, cert. den. 431 U.S. 974 (1977).

merit, the Court entered the Orders in each of the cases, directing enforcement of the subpoenas.[5]

Dated: January 14, 1980

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

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[5] In view of the Court's ruling on the merits, the various requests of the respondents for discovery and to dismiss the petitions are moot.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. 79-149

UNITED STATES OF AMERICA

v.

EXXON CORPORATION

Misc. 79-150

UNITED STATES OF AMERICA

v.

SHELL OIL CO.

Misc. 79-217

UNITED STATES OF AMERICA

v.

MARATHON OIL CO.

Filed Jan. 15, 1980

MEMORANDUM ORDER

This comes before the Court on respondents' motions for a stay of the Court's Order of December 17, 1979, pending appeal. In that Order, the Court granted the

petition to enforce subpoenas duces tecum issued to the respondents.

The guidelines for consideration the the [*sic*] respondents' request are found in *Virginia Petroleum Jobbers Association* v. *FPC*, 104 U.S. App. D.C. 106, 259 F.2d 921 (1958), and *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 182 U.S. App. D.C. 220, 559 F.2d 841 (1977). These are whether the respondents have made a strong showing that they are likely to prevail on the merits, that they would suffer irreparable harm if the stay is not granted, that the issuance of a stay would not substantially harm any of the other parties, and finally, where lies the public interest. 104 U.S. App. D.C. at 110, 259 F.2d at 925.

Viewing each guideline separately, the Court concludes that respondents have not made a strong showing that they will prevail on the merits. The Court has carefully considered the extensive briefs submitted in this case together with the arguments of counsel. Two separate hearings were held in these cases. The Court concluded that the subpoenas should be enforced and that the Department of Energy (DOE) has the authority to issue the subpoenas pursuant to 42 U.S.C. § 7255. Respondents have raised nothing in their motion for a stay pending appeal which would change the Court's conclusion.

With respect to the irreparable harm that the respondents might suffer, it falls within two categories. First is that, if the subpoenas are enforced, the respondents would be required to turn over information that they contend is confidential and which might affect their competitive position in the market if exposed to the public. The Court's order providing for ten days notice should make such a breach of confidentiality unlikely. Second, if they are required to comply with the subpoenas prior to the appeal, such action would effectively moot the appeal.

As to the possibility of substantial harm to the other parties and where lies the public interest, any harm to the petitioner would be that it may not be able to obtain the necessary information for the completion of the study under the Petroleum Marketing Practices Act (PMPA) and the completion of that study is presumably in the public interest.

"The Court is not required to find that ultimate success by the movant is a mathimatical [*sic*] probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to moveants' view of the merits". 182 U.S. App. D.C. at 222, 559 F.2d at 843. Here, the Court views the respondents' likelihood of success as far below 50%. Nevertheless, it has balanced the other factors in these cases and concludes that a stay, conditioned upon certain actions by the respondents, should be granted. Those other factors are that this is a case of first impression, that the parties can seek an expedited appeal, that respondents have agreed that they will cooperate with the petitioner in seeking an expedited appeal and that such should be done, that an expedited appeal would not unduely burden either side to this controversy since the cases have been fully briefed and argued, that the respondents, notwithstanding the pendency of the appeal, can forthwith begin to collect the requested information so as to be in a position to immediately turn that information over to the petitioner by a date certain or final resolution of the appeal in favor of petitioner, if that is the case, and that while the petitioner may require the information in order to complete the study under the PMPA, DOE has already received similar information from other oil companies as a result of their voluntary compliance, those companies including Atlantic-Richfield Co., Standard Oil of Indiana, the Gulf Oil Companies, Texaco, Inc., Clark Oil and Refining Corp., and Ashland Oil Co.

In view of the above, it is hereby

ORDERED that the Court shall grant the respondents' motion for a stay pending appeal on the following conditions:

1. Respondents shall cooperate with petitioner in seeking to have the appeal heard on an expedited basis.

2. Respondents shall immediately begin to collect the necessary information and be prepared to turn that information over to the petitioner on or before February 15, 1980, or on the date of the decision of the Court of Appeals, if that court affirms the order of this court, whichever is later.* Respondents shall advise this Court and the Court of Appeals that they are in compliance with this condition.

Dated: January 14, 1980

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

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* This requirement is similar to and in lieu of the posting of a bond pending appeal. Respondents have represented to the Court that they would begin the process of collecting the information although there is a dispute as to when such information can actually be furnished. This Court concludes that that information should be available no later than February 15, 1980.

APPENDIX G

[SEAL]

Department of Energy
Washington, D.C. 20461

April 25, 1979

Jay L. Carlson, Esq.
Miller & Chevalier
1700 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006

Re: Subpoena issued to Mr. C. C. Garvin, Jr.
Chief Executive Officer, Exxon Corporation,
January 22, 1979

Dear Mr. Carlson:

I have received the "Application to Quash or Modify Subpoena" filed on March 20, 1979. There are no provisions in the DOE rules providing for such motions. I am, moreover, unpersuaded by your arguments.

Since we have been unable to reach a satisfactory agreement regarding document production, I am turning this matter over to the Office of the General Counsel.

Sincerely yours,

/s/ William C. Lane, Jr.
WILLIAM C. LANE, JR.
Director
Office of Competition

APPENDIX H

UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
WASHINGTON, D.C.

SUBPOENA

TO: Mr. C. C. Garvin, Jr., Chief Executive Officer, Exxon Corp., 1251 Avenue of the Americas, New York, N.Y. 10020.

YOU ARE HEREBY REQUIRED TO APPEAR before William C. Lane, Jr., an officer of the Department of Energy, or his designated representative, at Room 7A-142, 1000 Independence Avenue, S.W., Washington, D.C. on the 20th day of February, 1979 at 9:00 A.M. to provide information for use in the preparation of a study required by Title III of the Petroleum Marketing Practices Act (PL 95-297).

YOU ARE FURTHER REQUIRED TO bring with you and produce for examination at the time designated above the documents and material specified in Attachment "A".

FAILURE TO OBEY THIS SUBPOENA MAY RESULT IN REFERRAL TO A UNITED STATES DISTRICT COURT FOR ENFORCEMENT.

Issued this 22d day of January, 1979 under the authority of Section 13(e) of the Federal Energy Administration Act of 1974 and Section 645 of the Department of Energy Organization Act.

Signature William C. Lane, Jr.
Director
Office of Competition
Policy and Evaluation
Department of Energy

ATTACHMENT A

INSTRUCTIONS

1. Definitions

(a) The term *domestic* means within the United States.

(b) The term *document* means writings of any kind, however produced or reproduced.

(c) The word *or* is inclusive, referring to any one or more of the disjoined words or phrases.

(d) The term "*your company*" means the company named on the face of the subpoena, and all firms in which it owns an equity interest greater than 50 percent that are engaged in whole or in part in the production, refining, or transportation of crude oil, or the transportation, marketing, or distribution of motor gasoline, within the United States or any part thereof.

2. Complete Documents

Where a document includes any material called for by the subpoena, the subpoena requires the production of the entire document, including all attachments, cover memoranda, appendices, etc., even if only part of the document is responsive to any specification.

3. Claims of Privilege

Any document responsive to any of the specifications which is not produced by reason of any claim of privilege, statute, or regulation shall be identified by a short description of each such item, including the title, the type of document, the subject matter, the name, address and title of its author(s), the names and addresses of persons to whom copies were furnished, the date of preparation,

and a short statement of the reasons which in your opinion justify withholding it.

4. Specification Identification

Each document shall be identified as to the specification or specifications to which it is responsive.

5. Limitations of Document Search

Provide all documents described in the Specifications below which were prepared by, or received by, any of the following individuals or groups within your company during the period January 1, 1970 to the date of this subpoena:

(a) The Board of Directors or any committee thereof;

(b) the president or chief executive officer;

(c) the senior management committee;

(d) any committee or individual with the authority to approve capital expenditures of $3 million or more;

(e) the vice president in charge of domestic refining (or, if there is no such vice president, the highest level employee in the company whose primary responsibility is domestic refining);

(f) the vice president in charge of corporate planning (or, if there is no such vice president, the highest level employee whose primary responsibility is corporate planning).

(g) the vice president in charge of domestic marketing (or, if there is no such vice president, the highest level employee whose primary responsibility is domestic motor gasoline marketing).

SPECIFICATIONS

(1) All documents that evaluate, analyze, or report on the feasibility or desirability of evaluating separately the financial performance of different functional levels within your company's petroleum operations.

(2) All documents that evaluate, analyze, or report on the financial performance or projected financial performance of any functional level or comparison of functional levels within your company's petroleum operations.

(3) All documents that evaluate, analyze, or report on plans for the domestic test marketing of motor gasoline.

(4) All documents that evaluate, analyze, or report on the domestic marketing of motor gasoline under secondary brand name(s).

(5) All documents that evaluate, analyze, or report on the expansion or contraction of the geographic area (within the United States) in which motor gasoline is marketed under brand name(s) owned by your company.

(6) All documents that evaluate, analyze, or report on motor gasoline market shares of your company or any other company in any State or metropolitan area.

(7) All documents that evaluate, analyze, or report on the effects of the Department of Energy price or allocation regulations (10 CFR Parts 210, 211, and 212) on the domestic marketing of motor gasoline.

(8) All documents that evaluate, analyze, or report on the financial aspects of proposals or plans to build,

expand, close, purchase, or sell any domestic or Caribbean refinery.

(9) All documents that evaluate, analyze, or report on the financial aspects of proposals or plans to build, or to expand the capacity of, any domestic crude or product pipeline, or purchase or sell any interest in any domestic crude or product pipeline.

(10) All documents that evaluate, analyze, or report on the efficiency of, profitability of, or competitive advantages or disadvantages of, the domestic refining or motor gasoline marketing operations of any firm other than your company.

(11) All documents that evaluate, analyze, or report on your company's plans for domestic marketing of motor gasoline through company-operated stations.

(12) All annual or periodic domestic motor gasoline marketing plans and all documents that evaluate, analyze, or report on such plans.

APPENDIX I

SENATE DEBATE ON TITLE III OF THE PETROLEUM MARKETING PRACTICES ACT

[124 Cong. Rec. S 7149 - 7158 (Daily ed., May 9, 1978).]

[S 7149]

PETROLEUM MARKETING PRACTICES ACT

The Senate continued with the consideration of the bill.

Mr. DURKIN. Mr. President, I ask unanimous consent that Mike Harvey of the Committee on Energy and Natural Resources, Henry Banta, Tom Susman, of Senator KENNEDY'S staff, and Richard Arnold of Senator BUMPERS' staff be granted the privilege of the floor during debate on the pending bill. I make the same request for Linda Gold as well.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Arkansas is recognized.

UP AMENDMENT NO. 1307

Mr. BUMPERS. Mr. President, the pending amendment is amendment No. 1809 introduced by Mr. MARK O. HATFIELD and me. I send to the desk a modified version of that amendment.

THE PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

The Senator from Arkansas (Mr. BUMPERS) proposes unprinted amendment numbered 1307 as a modification to amendment No. 1809.

Mr. BUMPERS. I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

* * * * *

[Text of Title III as enacted is omitted.]

[S 7150]

The PRESIDING OFFICER. The amendment will be so modified.

Mr. BUMPERS. I ask unanimous consent that the Senator from Washington (Mr. JACKSON), the Senator from New Mexico (Mr. DOMENICI), the Senator from Kentucky (Mr. FORD), the Senator from Louisiana (Mr. JOHNSTON), and the Senator from Alaska (Mr. GRAVEL) be added as cosponsors to the amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BUMPERS. Mr. President, this amendment reflects a compromise on the issue of title III, which is pending before the Senate. It is a compromise which deals with the most controversial part of the bill. I believe that the managers will be willing to accept it.

The compromise, very briefly, will require the Secretary of Energy to study the subsidization issue fully. Full provision is made for public involvement in the study. The Secretary must send his study, together with appropriate legislative recommendations, to the Congress within 18 months after enactment.

In addition, this amendment establishes a procedure where the President may develop interim measures to protect the competitive viability of the marketing sector of the petroleum industry if he considers them necessary and appropriate. Congress would have 90 days to act affirmatively on his proposal.

Any interim proposals which might be accepted by the Congress would not extend beyond 18 months from the date of their affirmation by Congress.

Mr. President, if no interim measure is submitted to Congress, then, of course, at the end of 18 months from the date of enactment of this bill the Secretary shall submit legislative recommendations to Congress, if he finds them to be necessary to protect the people we are trying to protect under the present legislation. If the President determines that interim measures are necessary, Congress will have 90 days in which to affirm the recommendations of the President under the procedures set forth in section 523(a) of the Energy Policy and Conservation Act.

I think it is an excellent compromise, and I hope all my colleagues will see fit to support it.

Mr. President, I believe that adoption of this amendment will help clear the way for enactment of H.R. 130, which will provide important protection to wholesalers and retailers of gasoline from arbitrary termination of supply.

Mr. President, I ask unanimous consent that the name of the distinguished Senator from Tennessee (Mr. BAKER) be added as a cosponsor of the amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. FORD. Mr. President, I ask unanimous consent that Jim Fleming, of my staff, have the privilege of the floor during the debate and vote on H.R. 130.

The PRESIDING OFFICER. Without objection, it is so ordered.

Who yields time?

Mr. DOMENICI. Mr. President, will the Senator yield 5 minutes to the Senator from New Mexico?

Mr. BUMPERS. I am happy to yield 5 minutes.

Mr. DOMENICI. I thank my good friend.

Mr. President, I would like to take several moments to specifically address the issue of title III, and also to make several comments on what I am told will be forthcoming amendments to title III.

Congress has moved on several occasions to protect independent segments of the petroleum industry. During

the oil embargo, Congress and the executive branch protected independent refiners through the entitlement program. Now the dealers are receiving protection under title I of the dealer day in court. Title III provides comparable protection for the independent marketers—jobbers. Jobber concerns stem from a changing oil market. Their principal concern is that integrated oil companies, both major and independent refiners, are subsidizing their marketing operations with revenues earned upstream.

On a national basis, this concern is borne out by the decline in total retail outlets over the past several years, which have been accompanied in turn by an increase in salary operated stations by refiners. Major refiners have increased their sales from salary operated stations by 55 percent while independent and small refiners have increased their salary operated sales by 50 percent. Overall, refiner owned and operated stations have increased their marketshare by one-third.

Refiner comments on title III admit that a margin of 3 to 5 cents a gallon is appropriate between a jobber purchasing gas at the refinery—at the rack—and the sale price at the dealer outlet. The following table gives examples of what can only be subsidized pricing by refiner operated outlets. I ask unanimous consent to have the table printed in the RECORD.

There being no objection, the table was ordered to be printed in the RECORD as follows:

Refiner: Location	Jobber price	Price to dealer (DTW)	Refiner direct price
Marathon: Meridian, Mich.	55.02	58.19	56.19
Powerline: Redwood City, Calif.	52.45	—	52.9
Ashland: Charlotte, N.C.	51.703	—	51.9
Champlin: Oklahoma City		53.56	51.91
Clark: Alliaoca, Ohio	52.7	—	51.91

Mr. DOMENICI. Mr. President, the most recent evidence available is some January 1978 figures from Kansas where Champlin Petroleum is selling on the street at 0.519 and selling to its jobbers for 0.5175. This is a 0.0015 difference, a situation that begs explanation.

Title III is predicated on a question: Why would integrated oil companies sell below cost? Title III answers that as a general rule below cost sales are predatory per se unless: They result, in fact, from proven cost savings; they are designed to meet competition; or they are provided to enter a new market.

The basic elements of title III are as follows:

First. Section 302 prohibits subsidization.

Second. Section 303 makes price data available to independent marketers.

Third. Section 304 provides for defenses based on cost, meeting competition, or penetrating a new market.

Fourth. Section 305 switches the burden of proof once the jobber has proved below cost sales.

Fifth. Section 306, the enforcement section, provides for civil fines, and a private right of action for treble damages.

Sixth. Section 307 is the definitions section.

I should like to stress that in fashioning title III, largely at my urging, I and other committee members made a variety of changes designed to meet what we saw as legitimate criticisms.

Nevertheless, several policy arguments have been raised against the bill. These include:

First. The oil industry does not know its costs: Baloney. How then does the industry know if it is making a profit? How does it know whether to make more or less of a given product? To open or close stations? The following quote from Champlin to one of its Kansas lessees should help lay the matter to rest as to whether the industry knows its costs:

Champlin Petroleum Company regrets to inform you that it has determined that it is no longer economic for it to operate the Champlin Service Station located at U.S. Highway No. 56 and I-35 West, McPherson, Kansas, under the present lease agreement with you.

This issue of costs raises a more fundamental question. My opposition to divestiture is based on the belief that integrated oil operations generate efficiencies and economies of scale. In simple terms: they lower costs. Now the industry tells us they cannot document this. The industry cannot have it both ways. Either the cost savings of integrated oil operations can be documented or they cannot. And if they cannot, either they should be, or the industry should be broken up.

Second. The Domenici title III will comulicate [*sic*] antitrust litigation: This is the last straw. Antitrust litigation has been ponderous and incomprehensible for decades. The present FTC case against the industry is an example. The FTC filed its complaint in 1973. In 1975, its first subpena was squashed. In November of 1976, it issued a "minisubpena." This modest subpena ran to 1,300 pages for each of the 8 major companies. The industry responded with somewhere between 500,000 and 1 million pages. And what type of information did this "minisubpena" call for. Just basics. Organization charts, holdings, and so forth. A new subpena has now gone out asking for more information. Five years after its start, the FTC case is in the early, I repeat, early stages of discovery. Urgings by oil industry lawyers that independent marketers not confuse the crystalline verities of antitrust litigation remind one of the nursery rhyme poem:

[S 7151]

Will you walk into my parlour,
said the spider to the fly
Tis the prettiest little parlour
that ever you did spy.

Oh, no, no, said the little fly,
to ask is in vain.
For who goes up your winding stair,
can ne'er come down again.

In short, independent marketers believe they serve an important competitive function. If they are to be driven from the marketplace, it should be because of increased efficiency, not because of the market power of the big fish who live upstream. All they ask is a chance to compete fairly. This hardly seems too much to ask.

Mr. President, at this point I would like to spend several minutes discussing the compromise that has been worked out at the 11th hour on title III. As my remarks indicate, I am satisfied with the present title III. It is a finely tuned solution to the problem at hand. It does not establish another wave of regulations. It simply gives the little guy his day in court.

It is apparent, however, to the proponents of title III that there is not support for the present title III. This lack of support arises in some cases from a legitimate concern over the lack of data at hand. Although I find this argument unpersuasive, I admit its strength.

Now, Mr. President, I am not one to attack bigness for bigness' sake. I am also not one that believes that the oil industry is evil incarnate. I do, however, believe that this biggest of American industries does the Nation a disservice when they refuse to allow the little guy a chance to make his case in court.

I feel a study is like prescribing aspirin for a severed jugular. Personally, I believe we should attend to the business at hand: Protecting the independent marketers. I do not believe their livelihood should be sacrificed while we await the results of a study. I believe the need for action is now.

Accordingly, I join this compromise not out of conviction, but rather because I see it as the only way that the independent marketers can keep their case before the

Congress. To be frank, a setback here might doom their cause forever. I see this amendment as a way for the independent marketers to establish a more complete factual case. In short, I see it, in military terms, as a way for them to keep an army in the field so that they can return to fight another day.

Mr. President, the dealer's day in court bill would have come to the Senate with two titles that basically directed their attention to trying to protect the independent filling station operator as we move through this energy crisis and these difficult, changing times. I certainly support that; that is needed.

As that evolved during the last year or year-and-a-half, it became quite obvious that there was another group of independent businessmen related to the delivery of petroleum and petroleum products—sometimes called the independent jobbers, sometimes called the independent marketers, sometimes called independent wholesalers—who indeed were becoming the victims of both major refineries and refineries that own substantial numbers of filling stations, by virtue of the fact that it appeared, and the facts seemed to indicate, that the refiner would take upstream profits and put them into downstream cut-rate prices at the filling station level, while at the same time, in many instances, selling to their own jobber in between for a higher price. If this were happening within an integrated company, then most certainly it also was happening in the field at large, where a major refinery or a large refinery was selling at subsidized prices downstream, having earned the profits upstream in the refinery, and a jobber or independent distributor was caught in the middle, paying a higher price for the same product.

It was my opinion that that kind of marketer, who, by definition, is independent, was necessary in the American marketplace system, that we usually ask them to take care of the distribution system where it was most

expensive, in the rural parts, where they had to drive large distances to serve the filling stations to which they sold. It appeared from the facts that they were going to be gobbled up and put out of business by this process.

So it was my amendment in committee that gave a private cause of action to this kind of independent jobber or distributor to sue the refinery, if he could prove that there was such a subsidization downstream by virtue of the profits upstream in the integrated system.

Since our antitrust laws do not help this kind of person, we can imagine an independent jobber using the existing antitrust laws of our Nation to try to take on this kind of situation, with all the truth that is required and the resources that are required.

So my amendment would say that if you can prove the differential in price, let the burden shift, and see if the big one can disprove that it is trying to control the market.

I acknowledge that my amendment to title 3, which was adopted by a slim margin in committee—8 to 7—would have been defeated here today. It is a new and different approach to create a cause of action of this type based only upon the evidence that I required in my amendment. So I have most willingly joined the distinguished Senators who bring this substitute. It will not do the job as well, but it will begin an investigation of the facts, to see if what we are saying is happening and to make recommendations, if they are happening, as to how to cure it.

This amendment will provide a remedy, by virtue of Congress being able to adopt the recommendations in an expeditious manner, if recommendations are forthcoming. During this study, and as a result of it, this would protect this middle-man independent in the scheme of integration that is going on in this country, where they are finding less and less of an opportunity to survive.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. DOMENICI. Mr. President, will the Senator yield me 1 additional minute?

Mr. BUMPERS. I yield 2 minutes to the Senator.

Mr. DOMENICI. Mr. President, I generally have not been one who wants to put restrictions on the private sector. I have not been one who takes on bigness simply because it is big. I take them kind of one at a time and look at them. But I am firmly convinced, and the evidence in my statement convinced me, that if we do not do something, there would be no more independent marketers or jobbers in the delivery system of petroleum products in this country.

I hope those in the industry will understand that the Bumpers-Hatfield-Domenici substitute amendment today is a serious one; that in a year or so we will find the evidence reversing itself, and perhaps we will never have to do anything else; but, if not, that we find a way to cure this approach which, in my opinion, is definitely committed in the direction of monopoly; in the direction of putting the little independent out of business.

Mr. President, I ask unanimous consent that a statement by Senator MARK O. HATFIELD be printed in the RECORD.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

STATEMENT BY SENATOR MARK O. HATFIELD

I am pleased to join with my colleagues in support of the modified version of amendment 1809.

This compromise proposal will require the Secretary of Energy to study the subsidization issue fully. Full provision is made for public involvement in the study. The Secretary must send his study, together with appropriate legislative recommendations, to the Congress within 18 months after enactment.

In addition, this amendment establishes a procedure where the President may develop interim measures to protect the competitive viability of the marketing sector of the petroleum industry if he considers them necessary and appropriate. Congress would have 90 days to act affirmatively on his proposal.

I believe that adoption of this amendment will help clear the way for enactment of H.R. 130, which will provide important protection to wholesalers and retailers of gasoline from arbitrary termination of supply.

I urge my colleagues to support this amendment and to adopt this legislation.

Mr. BUMPERS. Mr. President, I yield 2 minutes to the Senator from Wyoming.

Mr. HANSEN. I thank my distinguished colleague from Arkansas for his courtesy.

Mr. President, we have searched long, with our colleagues, the ramifications of title III in this bill. We have written to the Department of Justice as well as to the Federal Trade Commission. We have letters from them which have not been included in the hearing record before our committee.

In essence, both the Department of Justice and the Federal Trade Commission have opposed title III as written. It is their considered opinion that, in a word, this title III is anticompetitive, that it will not achieve the goals that I know its sponsors hope very much might be achieved.

[S 7152]

Mr. President, the amendment is acceptable to our side. This is a reasonable compromise, and we will anxiously await the results of the study, so that we can deal in a rational way with the subsidization issue if it becomes necessary.

I am prepared to yield back the remainder of my time, if the distinguished floor manager of the bill is willing to

do so. But I withhold that, awaiting whatever signal the Senator from New Hampshire may want to give.

Mr. DURKIN. I thank the Senator from Wyoming.

Mr. President, we have a serious problem. I am not sure the original language in title III solved that problem. Someone is going to have to face up to it. We hope that the study language will enable us to come to better terms with what I consider to be a growing problem, which many of us consider to be a growing problem.

I am willing to accept the amendment of the Senator from Arkansas, as modified.

Mr. HANSEN. I am willing, then, to yield back the remainder of my time.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

Mr. KENNEDY. Mr. President, I send an amendment to the desk.

Mr. HANSEN. I withhold that.

The PRESIDING OFFICER. Until the time on this amendment has expired, an amendment to it is not in order.

Mr. KENNEDY. I understood that. I thought the time had been yielded back.

The PRESIDING OFFICER. The time had not been yielded back.

Mr. BUMPERS. Mr. President, what is the remaining time on the amendment?

The PRESIDING OFFICER. The Senator from New Hampshire has 28 minutes remaining and the Senator from Arkansas has 17 minutes remaining.

Mr. BUMPERS. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. BUMPERS. If the amendment of the Senator from Massachusetts is an amendment to a modified

amendment, the Senator from Arkansas submitted, which is now the pending business, is it not an amendment in the third degree and, therefore, out of order after all the time is yielded back?

The PRESIDING OFFICER. The committee amendment is considered original text for the purpose of amendment. The amendment of the Senator from Arkansas, therefore, is in the first degree and the proposed amendment of the Senator from Massachusetts would be in the second degree.

Mr. KENNEDY. Mr. President, I am sure that is what the Senator from Arkansas intended.

[Laughter.]

Mr. BUMPERS. I certainly do not want to cut off the time the Senator from Massachusetts might have.

Mr. KENNEDY addressed the Chair.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. KENNEDY. Mr. President, how much time is there on the amendment to the amendment?

The PRESIDING OFFICER. There will be one-half hour on an amendment to amendment, equally divided. But the second amendment has not been proposed yet.

Mr. BUMPERS. Mr. President, just so the record is straight, I am prepared to yield back the remainder of my time if the floor manager is in agreement in order that Senator KENNEDY may go ahead and offer his amendment and let the time start running on his amendment.

Is the floor manager prepared to yield back the time?

Mr. DURKIN. I am prepared to yield back the time.

The PRESIDING OFFICER. The Senator from New Hampshire yields back time.

Mr. DURKIN. He may call up his amendment at this time.

Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. DURKIN. How much time will be allotted? Is it a half-hour on this amendment to be equally divided?

The PRESIDING OFFICER. Fifteen minutes to the Senator from Massachusetts and 15 minutes to the Senator from New Hampshire.

Mr. KENNEDY. I hope since it is a worthy amendment that it will be accepted.

Mr. BUMPERS. Mr. President, in the unlikely event it is not a worthy amendment and universally acceptable, I ask unanimous consent that the 30-minute time limit be divided equally between the proponent, Mr. KENNEDY, and myself.

The PRESIDING OFFICER. Is there objection?

Mr. KENNEDY. If the manager of the bill has no objection, I have no objection.

Mr. BUMPERS. We are getting into a fox watching the henhouse type of situation here. Mr. President, because I think the Senator from New Hampshire favors this amendment.

Mr. KENNEDY. Whose time is this charged to, Mr. President?

The PRESIDING OFFICER. Who yielded time?

Mr. KENNEDY. Mr. President, I do.

Mr. BUMPERS. I made a unanimous-consent request.

Mr. DURKIN. Mr. President, reserving the right to object, I think we should proceed with the normal course, that the Senator from Massachusetts will offer his amendment, and I will be glad to yield to my good friend from Arkansas time to rebut in the event he does not care to accept this amendment.

Mr. BUMPERS. That is fine with me, Mr. President.

The PRESIDING OFFICER (Mrs. HUMPHREY). Does the Senator withdraw his request?

Mr. KENNEDY. Madam President, as I understand, I have 15 minutes, and I wish to yield what time I might need.

The PRESIDING OFFICER. The Senator from Arkansas has made a unanimous-consent request. Does he withdraw it?

Mr. BUMPERS. Madam President, I withdraw the request.

The PRESIDING OFFICER. The Senator from Massachusetts.

UP AMENDMENT NO. 1308

Mr. KENNEDY. Madam President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Massachusetts (Mr. KENNEDY) proposes an unprinted amendment numbered 1308.

On page 3, at the end, insert the following new section:

"SEC. 802. Any energy information acquired, collected, or held by the Department of Energy shall be subjected to the requirements of Section 11(d) of the Energy Supply and Environmental Coordination Act of 1974, Public Law 93-319."

Mr. KENNEDY. Madam President, this amendment is very simple. It basically tracks the actions which have been taken by the Senate on previous occasions. It makes energy information available to certain other agencies of the Federal Government.

Under the amendment which is before us, Madam President, a study will be done by the Department of

Energy. The whole issue to be studied is one which is fundamental to this particular legislation; it is the competitive position of the independent retailers and marketers and the extraordinary economic power which has been used to squeeze them out of this industry.

So it is basically an issue of competition, and the agencies of our Government which are concerned about the competition happen to be the Federal Trade Commission and the Department of Justice, and not necessarily the Department of Energy.

Under the amendment which I have offered to the amendment of the Senator from Arkansas, no new authority is given to any of the agencies. The Department of Justice on its own can get the same information that is collected by the Department of Energy. The Federal Trade Commission can also get the same information.

All we are saying is if we are so concerned about competition, so concerned about the little guy, so concerned about the corner gas station, then let us say if the Department of Energy is going to get that information, they will share it with those agencies of Government that have the primary responsibility for protecting the little guy, the corner gas station, and the independent segment of our society.

It is not very complicated. It is not very complex. The Senate has already gone on record in support of this amendment last year in the coal conversion bill. It was dropped in conference. This body already voted for this amendment last year and suddenly when we have a bill down here that really is talking about dealing with competition, then there is a reluctance to set information and share it with the other departments of Government.

In this particular amendment, Madam President, we have the confidentiality provisions that are spelled out under

section 11(d) to insure that this information will not be leaked and we have the other provisions for the protections of confidentiality.

Madam President, I just wonder why it is that last year the Senate was prepared to accept the sharing of information between governmental agencies, and now we in the Chamber are refusing to say, if the Department of Energy gets data, it must share it with the Department of Justice or the Federal Trade Commission.

That is, Madam President, just a position which I find difficult to justify, particularly when we are talking about a fundamental theme of this legislation which is supposed to be competition and the protecting of small independent marketers.

So, Madam President, a final point that I make is that the Department of Justice and the Federal Trade Commission have repeatedly stated their need for the energy data. President Carter said that energy data analysis is the keystone of the administration's approach to the formulation of competition policys in the energy industry. I certainly hope that the amendment will be accepted.

I reserve the remainder of my time.

The PRESIDING OFFICER. The galleries will be in order.

Who yields time?

Mr. BUMPERS. Madam President, will the Senator from New Hampshire yield?

Mr. DURKIN. I am glad to yield 10 minutes to the Senator from Arkansas.

Mr. BUMPERS. Madam President, the amendment the Senator from Massachusetts is proposing has the effect of making certain that this study will not be completed in 18 months. It will not be completed in 18 years.

The purpose of the study in the modified amendment I offered is to determine if major oil companies are using

upstream profits at the refinery level or at the marketing level to subsidize their company-owned stations to the detriment of independently owned stations.

To give you some idea of how bad title III was before we offered this modified amendment, both the Justice Department, the Antitrust Division, and the Federal Trade Commission were unalterably opposed to title III. Now, the fact that they were opposed to it is not totally compelling to me, but it does throw up a red flag to me and say, "Wait just a minute. If they are opposed to it on the grounds they set out, let us try to help the small independent retail service stations in the country, but let us do it in an orderly, workmanlike manner, and let us not try to prove who hates major oil the most."

Now, the Senator from Massachusetts knows I have never been guilty of being considered a close associate of major oil companies in this country. I am vitally concerned about small business of all kinds. I am especially concerned about small independent service station operators, who may indeed be facing unfair competition from major oil companies or any oil company, that maybe using upstream profits to unfairly compete and drive independents out of business.

So what are we doing here? We are saying, "Let us allow the Secretary of Energy to make a determination as to whether or not this is a problem." Why on earth would we stand here and try to pass a law when there is no manifestation that the law is needed? That is what has got people in this country upset now.

What would the Senator from Massachusetts' amendment do? Why, he says, "Let us permit the Department of Energy to do this study subject to a little old provision here called section 11(d) of the Energy Supply and Environmental Coordination Act of 1974."

What does that do? It says the Secretary of Energy may not share this information. He must keep it confi-

dential except, and then everybody on God's green Earth is named in section 11(d).

He has to keep it confidential except that he will give it to any delegate of the Federal Energy Administration for the purposes of carrying out this act; he will give it to the Attorney General; he will give it to the Secretary of Interior; he will give it to the Federal Trade Commission; he will give it to the General Accounting Office, and those are the only ones named he has to share this information with. That is what I call confidentiality. [Laughter.]

Madam President, I have the same feelings the Senator has about getting this kind of information into the hands of the Antitrust Division of the Justice Department. But do you know something? They can get the information today. They do not have to have this act. They can get it today.

I want the Federal Trade Commission to have it, because the Federal Trade Commission is charged with the responsibility of promoting competition in this country to preserve the free enterprise system. But the Federal Trade Commission can go and get it today, they do not need this bill. So what are we doing? We are cluttering up the books.

Mr. DURKIN. Mr. President, will the Senator yield?

Mr. BUMPERS. In just one moment.

If you want to make sure that the Secretary of Energy gets no cooperation in carrying out the terms of this amendment, just adopt the amendment of the Senator from Massachusetts, and I promise you that hell will freeze over before they will voluntarily give one ounce of information, because they know it is going to be disseminated to everybody under the shining Sun.

Mr. DURKIN. Mr. President, will the Senator yield for a question?

Mr. BUMPERS. I will be happy to yield.

Mr. DURKIN. Is the thrust of the Senator's opposition that he does not think the Department of Energy should give that information to the Attorney General, to the Federal Trade Commission, to the General Accounting Office? They are not hostile entities, are they? They are part of our Government charged with the responsibility to enforce the law. Why the fear of giving them the information?

Mr. BUMPERS. I have absolutely no objection to the Attorney General or the Federal Trade Commission or the General Accounting Office or anybody else getting the information, but we are trying to help the small dealer. If you adopt the amendment of the Senator from Massachusetts, you are assuring yourself that the Secretary of Energy will not get cooperation. The oil companies will know it is going to be shared with all these people, possibly used to prosecute them. They have been through this before, they know how the Federal Government works, and they know if this information is disseminated and anybody can possibly distort it to file some kind of prosecution against them, they will do it.

What I am saying is we are setting an 18-month time limit here, and I promise you the Secretary of Energy will not get into the front door in 18 months if this amendment is adopted.

Mr. DURKIN. But does not the Senator's opposition go to the principle that you can collect the information but you cannot use it?

Mr. BUMPERS. Absolutely not. If the Federal Trade Commission has any information to indicate that unfair competition is being perpetrated by the majors in violation of the criminal laws of this country, they ought to go after the information and prosecute them.

Mr. DURKIN. One further question: What is the position of the Secretary of Energy on this matter?

Mr. BUMPERS. I do not know the position of the Secretary of Energy on this amendment by Senator KENNEDY.

Mr. HANSEN. Mr. President, if the Senator will yield, I will be happy to tell him. The Secretary of Energy opposes this amendment.

Mr. DURKIN. That is the best argument I have heard for it yet. [Laughter.]

Mr. KENNEDY. Madam President, how much time do I have?

The PRESIDING OFFICER. The Senator from Massachusetts has 10 minutes.

Mr. KENNEDY. I yield myself 5 minutes.

I have heard convincing arguments from my good friend from Arkansas before, and I am usually very much carried away with the nationality of his dialog and debate.

But this particular argument he makes in opposition to this amendment fails to meet his usual standard of persuasiveness.

If you are talking about make-work for lawyers, you are talking about the Bumpers position. All those small independent outlets have to respond, under the Bumpers amendment, not only to the Department of Energy but to the Department of Justice and to the Federal Trade Commission.

We are saying if you collect it once, Mr. Local Gas Dealer, why are you going to have to answer all those paper forms again, because they have got the power to get it today?

Under the Bumpers amendment, they are going to have to go out there, each of those particular departments, and get that information. It is make-work for the lawyers.

We are hearing those words rattled around: "harassment of American business." Here we are threatening the har-

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assment of the smallest segment of American business.

The Senator from Arkansas points out or asks who is going to get all this information? The Department of Justice, the Department of Energy, the Federal Trade Commission, the GAO. Interesting. Add those together and what do you get? The Congress of the United States and the antitrust divisions of this Nation that are committed toward competition. Not a bad group—the American people, their elected representatives, and those who are charged with maintaining competition. Those are the people that are getting the information. Under the Bumpers amendment, if the Department of Energy gets the information, it does not even share it with the Congress of the United States. Yet under his particular amendment it gives the President the power to make recommendations for interim relief.

Do we get the information then? No. Does the Federal Trade Commission get the information? No. Does the Justice Department get it? No.

It just does not make any sense, Madam President, particularly when this body has gone on record, as we know, that it has been the failure of Congress to get intelligent, accurate information that has been at the heart of the inability to fashion and develop an adequate energy policy for this Nation to meet the needs of both producers and consumers alike.

We have not been able to get that information, and here we are in 1978 still saying, "Well, we have to oppose this amendment, because if we get a little information we want to keep it all nice and together." We want to do that so that the other agencies of Government cannot get it.

It does not make any sense in logic or rationality. Beyond that it does not make any sense in terms of energy

policy; and third, it does not make any sense in terms of trying to protect the legitimate interests of the people we are attempting to protect, and that is the small and independent firms in the oil and gas industry.

I withhold the remainder of my time.

Mr. DURKIN. Mr. President, will the Senator yield for a question? Was not this very same amendment part of the Coal Conversion Act?

Mr. KENNEDY. The Senator is absolutely correct. It was passed and accepted without dispute. That is why I felt some degree of hope.

Mr. DURKIN. What concerns me is the statement of the Senator from Arkansas that it could take 18 years to get the information.

If my memory serves me correctly, during the conference on the coal conversion bill, this is one of the things that JOHN DINGELL recommended. So if we have a conference, JOHN DINGELL will be chairman of the House conferees, and I think he will be as amenable to the prospect in this conference as in the conference on the coal conversion bill, and it will not slow down the bill and in fact will hasten the bill on its way to enactment and to the President's desk.

I urge that we accept the amendment.

Mr. KENNEDY. I thank the Senator.

Madam President, I would like to point out that both Mr. Shenefield, the Assistant Attorney General of Antitrust, and Mr. Doherty, the FTC's Director of the Bureau of Competition, have testified before the Antitrust Subcommittee that they cannot get data from the Deparment of Energy, and they have told us that this is true even today.

Mr. HANSEN. Madam President, will the Senator from Arkansas yield me one-half minute?

Mr. BUMPERS. The time is not mine. It belongs to the floor manager.

Mr. DURKIN. Madam President, I yielded the Senator from Arkansas 10 minutes. I do not believe he used all that time.

Mr. BUMPERS. How much of the 10 minutes did I use?

The PRESIDING OFFICER. The Senator from Arkansas used 5 minutes.

Mr. BUMPERS. In that case, I yield the Senator from Wyoming 1 minute.

Mr. HANSEN. Madam President, I would point out to my colleagues that the Energy and Natural Resources Committee is considering the energy information issue as a part of the Department of Energy authorization bill.

We agreed to do this during the conference on the coal conversion bill. Last week, I asked the committee staff to prepare recommendations so that we can act upon it.

I would suggest that the amendment of the Senator from Massachusetts is irrelevant to the issue before us.

I would also state that the administration is opposed to this amendment. They believe that the amendment would make it difficult to collect energy information. It goes much further than the study before us and would apply to all information.

I quote from the statement of the Energy Administration Service, headed by Mr. Lincoln Mosher. He says:

> Two of the Federal Trade Commission's bureaus nicely illustrate the same problem. The Bureau of Economics operates among other things, the Line of Business reports, essential to understanding concentrations and profits within particular industrial sectors. That Line of Business reporting system is intended to promote understanding of particular industries, otherwise strongly obscured by the cross-industry aggregation of revenues and outlays in the operating statements of conglomerates. The product of the Line of Business reporting system is the ability to follow profitability, concentration and, by inference, the competitive status of particular industries, not individual companies. Although the information has been furnished by individual companies, the product is an understanding of whole industries. A second bureau in the Federal Trade Commission is the Bureau of Competition. Its program is, doubtless, informed by industry-wide statistics like those coming from the Line of Business reports. But to perform its enforcement and prosecutorial functions the Bureau of Competition must have individually identifiable company data.

In a word, the Department of Energy Information Service opposes the amendment by the Senator from Massachusetts.

I thank the Senator from Arkansas for yielding.

Mr. BUMPERS. Madam President, along the lines of the comments of the Senator from Wyoming, here is what happened when the Federal Power Commission sought all kinds of information from the energy companies of this country on what they called Form 40. Form 40 was tied up in court for years, because we were doing what the Senator from Massachusetts is asking us to do now. The energy companies simply were not going to release that information voluntarily; they were not going to release it until after a court told them to.

If we adopt this proposal, we are saying to the oil companies that we are trying to prove a point that we do not like what they are doing. I will stand out on the Capitol steps and denounce the oil companies with the Senator from Massachusetts as loudly as he wants to, but that will not help the small independent dealers in the country.

What we are doing is calling them in and saying, "We are just going to ask you a few simple questions; don't worry about the sheriff and the prosecuting attorney,

they are just sitting here wanting to listen in, but you be as truthful as you can."

Then if they ask, "What if we tell you something that will be incriminating," we say, "Well, that could get a little hairy"; we are saying, "We cannot guarantee that you will not get in trouble, but don't worry about all these people sitting around that could prosecute you."

I will guarantee you we will be back here in 18 months without one scintilla of information. All the small dealers will still be going broke, nobody will know why, and we will not be able to do anything about it.

Madam President, on most tax matters I agree with the Senator from Massachusetts. But when we are in a time constraint of 18 months for the study, I say that we will not be able to get the information. If you want to bring the country down on your head to prove a point, the Senator's amendment is the greatest thing since night baseball. But if we are going to try to help the small dealers, the Senate should reject the amendment and pass something the oil companies will cooperate on and provide the small dealers with information they can act on, one way or the other.

I urge that the Senate reject the amendment.

Mr. KENNEDY. Madam President, I yield myself 3 minutes.

The issue we are talking about here is one of the most basic and fundamental competitive issues involving the petroleum industry, and that is the question of downstream subsidy of various levels of the oil industry.

It is interesting that the major oil companies do not have as much difficulty in providing information to the Department of Energy as they do to other departments in our Government that are supposedly protecting the little guy, the Federal Trade Commission and the Antitrust Division, by promoting competition. It just seems to me, Madam President, that they are going to have to get that information in order to make an informed judgment on these matters. It is

imperative as a matter of public policy, and it is imperative that those agencies of the Government be able to obtain it. I would hope that we would make it easier on the smaller companies, and, when the information is provided to the Department of Energy, provide that it be shared with the other agencies of the Government.

Mr. BUMPERS. Madam President, do I have any time remaining?

The PRESIDING OFFICER. The Senator from Massachusets has 2 minutes, and the Senator from New Hampshire has 3.

Mr. HANSEN. Madam President, if the Senator from Arkansas desires more time, I will be happy to yield some time on the bill.

Mr. BUMPERS. Well, I think the Senator from New Hampshire will yield me a minute or 2 to make just one concluding remark. There has been some mention about similar legislation on the coal conversion bill.

I would like to make two points. First, that was thrown out in the conference. It is not in the Conference report as the coal conversion bill.

Second, even the requirement of information which was in the original coal bill, before it was thrown out in conference, provided that only information which was gathered pursuant to the coal conversion bill would be shared.

Here the Senator from Massachusetts says any energy information that the Secretary acquires, collects, or holds shall be shared with all of these agencies.

I think his amendment is bad, but it would not be half as bad if he said any energy information collected pursuant to section 301. But this means any energy information collected pursuant to section 301. But this means any energy information that the Secretary gets pursuant to this bill or any other bill.

Mr. DURKIN. Will the Senator yield for a question?

Mr. BUMPERS. Yes.

Mr. DURKIN. Why in God's name is this body so afraid of information? We are supposed to be the Board of Directors of America. It is one thing to have the lady with the scales across the way at the Supreme Court blindfolded but legislators are not supposed to be blindfolded. Why insist that we be blindfolded?

Mr. BUMPERS. The Justice Department has subpena powers. If they are sure that something is going on that is wrong among major oil companies, they can subpena the information. They do not have to request it. They do not have to ask for their cooperation. Here we do. We are not talking about how we get the information. We are talking about who we are going to share it with. We are going to share it with everybody. I would just as soon talk about it over the clothesline in the backyard. I say when we do that we will get no cooperation. That is what we are trying to do, get enough information. I believe there will be enough cooperation to get the information to determine whether or not the practice we are trying to cure here is going on.

The Congress has been answering questions that nobody asked for years and it has people upset. This is just a manifestation and exacerbation of it.

Mr. DURKIN. But the United States is faced with a national energy problem. The U.S. Congress does not have the information. The only person who has the information is the pipesmoking, birdwatching Secretary of Energy, and he will not release that information.

Mr. KENNEDY. The fact of the matter is, Mr. President, that the Senate accepted—we are not talking about what was dropped over there in the conference but what the Senate accepted—these words:

"Any energy information acquired, collected or held by the Department shall be subject to the requirement" making it available. It was not limited to coal.

The fact of the matter is, Mr. President, if we accept the argument of the Senator from Arkansas we would

assume that those major oil companies are just waiting to empty all of their information on the Congress of the United States or the Department of Justice and the Federal Trade Commission. On the one hand, Mr. President, this bill is saying, "We are going to protect the small independent man in the oil industry, with title I and title II and protect him from being squeezed out." That is why we have titles I and II. Then the Senator from Arkansas says those nice, benevolent oil and gas companies who are doing the squeezing will give us all the information we want.

It just does not make any sense, Mr. President.

The Senator from New Hampshire understands it. The Senator from Massachusets understands it. Any trial attorney from the Justice Department or Federal Trade Commission who has spent day after day, month after month, year after year trying to get information understands it. Without this amendment we are going to continue business as usual on this particular issue.

Mr. President, I hope my amendment is agreed to. I yield whatever time I have remaining to the Senator from New Hampshire.

Mr. DURKIN. I was going to yield to the Senator a couple of minutes from the bill.

Mr. BUMPERS. Will the Senator yield 1 minute?

Mr. DURKIN. Yes.

Mr. BUMPERS. Just so no one is deceived by what we are talking about, from what the Senator from Massachusetts just said one would infer that if his amendment is adopted they could go into the oil companies and they would have to cough up the information. That is not the case. His amendment has nothing to do with what kind of energy information they will get. They will get no more information under his amendment than under mine. They will not have the right to get the information under subpena powers either way. The only thing the Kennedy amendment requires is the sharing of the information it

gets. It does not give the Secretary one iota of authority to get the information. It does not require the oil companies to divulge one iota of information they do not want to give. What we are talking about is who they will give it to after they get it. That is all the amendment goes to.

Mr. KENNEDY. If the Senator will yield, if we do not get it, it was the Senator's committee that wrote that statement, and if we do not get it we are just offering the best of what we can do with what came out of the Senator's committee. Section 11, which is the basis of this amendment, came out of the Senator's committee. That is the problem. We will certainly do better than the Bumpers amendment will.

Mr. BUMPERS. Mr. President, the Senator from Massachusetts is chairman of the Antitrust Subcommittee of the Senate Judiciary Committee and if he cannot get the Antitrust Subcommittee to get it for us, who will get it for us?

Mr. KENNEDY. I ask for the yeas and nays, Mr. President.

Mr. BUMPERS. Mr. President, I move to table the amendment.

The PRESIDING OFFICER. (Mr. Hodges). Is there a sufficient second?

There is not a sufficient second.

Mr. BUMPERS. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BUMPERS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BUMPERS. Mr. President, I ask for the yeas and nays on my motion.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is to agreeing to the motion of the Senator from Arkansas to lay the amendment of the Senator from Massachusetts on the table. The yeas and nays have been ordered. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Minnesota (Mr. ANDERSON), the Senator from Montana (Mr. PAUL G. HATFIELD), the Senator from Ohio (Mr. METZENBAUM), the Senator from Georgia (Mr. NUNN), and the Senator from West Virginia (Mr. RANDOLPH) are necessarily absent.

On this vote, the Senator from West Virginia (Mr. RANDOLPH) is paired with the Senator from Ohio (Mr. METZENBAUM).

If present and voting, the Senator from West Virginia would vote "yes" and the Senator from Ohio would vote "nay."

I further announce that, if present and voting, the Senator from Minnesota (Mr. ANDERSON) would vote "nay."

Mr. STEVENS. I announce that the Senator from Nevada (Mr. LAXALT) and the Senator from Oregon (Mr. PACKWOOD) are necessarily absent.

The result was announced—yeas 55, nays 38, as follows:

[S 7156]

[Rollcall Vote No. 158 Leg.]

YEAS—55

Allen	Ford	Long
Baker	Garn	Lugar
Bartlett	Glenn	McClure
Bellmon	Goldwater	Morgan
Bentsen	Gravel	Pearson
Bumpers	Hansen	Percy
Burdick	Hatch	Roth
Byrd, Harry F., Jr.	Hatfield, Mark O.	Schmitt
Byrd, Robert C.	Hayakawa	Schweiker
Cannon	Heinz	Scott
Chafee	Helms	Stafford
Chiles	Hodges	Stennis
Church	Hollings	Stevens
Curtis	Huddleston	Talmadge
Danforth	Inouye	Thurmond
Dole	Jackson	Tower
Domenici	Javitz	Wallop
Eastland	Johnston	Weicker
		Young

NAYS—38

Abourezk	Haskell	Nelson
Bayh	Hathaway	Pell
Biden	Humphrey	Proxmire
Brooke	Kennedy	Ribicoff
Case	Leahy	Riegle
Clark	Magnuson	Sarbanes
Cranston	Mathias	Sasser
Culvar	Matsunaga	Sparkman
DeConcini	McGovern	Stevenson
Durkin	McIntyre	Stone
Eagleton	Melcher	Williams
Griffin	Moynihan	Zorinsky
Hart	Muskie	

NOT VOTING—7

Anderson	Laxalt	Packwood
Hatfield, Paul G.	Metzenbaum	Randolph
	Nunn	

So the motion to lay on the table was agreed to.

(The following subsequently occurred:)

Mr. METZENBAUM. Mr. President, I was unavoidably absent at the time the motion to table the Kennedy amendment was made. I was absent on official business. Had I been present I would have voted in opposition to the motion to table.

Mr. THURMOND. Mr. President, on the vote on the Kennedy amendment I am recorded as voting against tabling it. The vote should have been in favor of tabling it, and I ask unanimous consent that the vote be changed.

Mr. ROBERT C. BYRD. Mr. President, reserving the right to object—and I shall not object—the Senator's vote would not change the outcome.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The above tally has been corrected to reflect the above order.)

Mr. BUMPERS. Mr. President, I move to reconsider the vote by which the motion was agreed to.

Mr. JACKSON. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. BUMPERS. Mr. President, I move the adoption of the amendment.

The ACTING PRESIDENT pro tempore. The question is on agreeing to the amendment.

The amendment (UP amendment No. 1307) was agreed to.

Mr. BUMPERS. Mr. President, are we ready to yield back the time?

Mr. DURKIN. Mr. President, I ask for a third reading.

The PRESIDING OFFICER. Without objection, the committee amendment is agreed to.

The question is on the engrossment of the amendment and the third reading of the bill.

The amendment was ordered to be engrossed and the bill to be read a third time.

The bill was read the third time.

Mr. STEVENS. Mr. President, I ask unanimous consent that Everett Wallace have the privilege of the floor. during the remainder of the day.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. JACKSON. Mr. President, the imminent passage today of H.R. 130, the Petroleum Marketing Practices Act, is a victory for small businessmen engaged in the marketing of refined petroleum products. It is a tribute to the perserverance of these businessmen, who must deal day in and day out with some of the most powerful, and also the most insensitive, corporations in this country, the major oil companies. It is further a special tribute to the tireless efforts of the executive director of the National Congress of Petroleum Retailers, Charles Binsted, who has represented the branded independent gasoline dealers of this country with a dedication which is an example of public service for small businessmen everywhere. I am sorry that Charlie is unable to be here to see the Senate vote on his bill. My thoughts, and the thoughts of everyone who has dealt with him on this issue, are with him.

The victory today is an important one, but—and I know Charlie would agree—it is only a partial one.

Title I of H.R. 130 provides basic protection for the gasoline dealer against arbitrary termination of his franchise by his supplier. However, a bill which goes no further than franchise protection goes only half the distance we need to go. The predatory manipulation of prices by gasoline suppliers is a threat just as serious, if not more so, than the threat of franchise termination. This is why I have so strongly supported legislation which goes the full distance and includes by a title III addressing price discrimination by gasoline suppliers.

Everyone knows how this discrimination works. The incoming mail of my colleagues is packed with letters from gasoline dealers telling the story in the clearest possible way.

The key to the oil company strategy is the company-operated outlet. The volume sold through these outlets increased 69 percent between 1972 and 1976. These outlets are the tools with which the oil company competes with its own independent dealers, with which it enforces greater oil company control over the marketplace.

A supplier subsidizes the price of gasoline through his own direct retail outlets. Nearby dealers must lower their prices. At the same time the supplier demands a higher share of the profits of these independent dealers and insists that their sales volumes increase. Some dealers are driven out of business by the squeeze: their franchises are terminated voluntarily because the dealers are going bankrupt. The supplier takes these stations over.

The result? Greater supplier penetration into retail marketing, larger supplier profits from sales to the remaining independent dealers, and a weakened independent retail sector. What we are seeing in this scenario is the beginning of the end of competition in gasoline marketing. Title I of H.R. 130 provides no defense against these tactics by suppliers.

The strength of competition in the sale of gasoline has and always will depend on the strength of the sector composed of branded and nonbranded independent marketers. These small independent businessmen function in the face of vigorous competition, and the consumer benefits. If this sector is lost or even substantially weakened, competition will suffer and the consumer will be the loser.

This simple fact ought to be evident to everyone. Yet we have heard and seen introduced into the record during the debate on H.R. 130 a highly curious analysis of the gasoline market that comes to just the opposite conclusion. This view has been put forward by self-proclaimed

defenders of competition and misguided defenders of the consumer who are in an alliance with the major oil companies to emasculate any provision of the bill aimed at prohibiting price discrimination by gasoline suppliers. In doing this, these people are doing the work of the oil companies, a group of corporations with less interest in the consumer and less interest in competition than almost any I can think of. In permitting the continuation, indeed, the spread of predatory oil company pricing policies these people are, in fact, initialing the death certificate of competition in the gasoline market. Somehow it is imagined that, even if thousands of branded and nonbranded independent marketers, unprotected by H.R. 130, are driven out of business over the coming years by these price manipulations, a competitive market for consumers will remain. Nothing could be more foolish.

No amount of investigation by the antitrust agencies or congressional hearings into the relationship between the OPEC cartel and the international oil companies is going to help this sector once it has been destroyed. And I am one who thinks that this interminable theorizing is perfectly useless in preventing the deterioration of competition.

I favor the enactment of effective measures to preserve the competitiveness of the gasoline market. We have to go the second mile and address the pricing power of the oil companies. If that can not be accomplished today, it must be accomplished soon in the next Congress. If not, our competitive retail gasoline market is in severe danger.

* * * * *

[Inserted remarks of Senator Culver are omitted.]

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Mr. DURKIN. Mr. President, I ask for the yeas and nays on passage.

The ACTING PRESIDENT pro tempore. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

The ACTING PRESIDENT pro tempore. Is all time yielded back?

Mr. DURKIN. All time has been yielded back.

Mr. ROBERT C. BYRD. Mr. President, for the information of the Senate, this is the last rollcall vote of the day.

The ACTING PRESIDENT pro tempore. The bill having been read the third time, the question is, Shall it pass? On this question the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. ROBERT C. BYRD. Mr. President, for the information of the Senate this is the last rollcall for today.

The ACTING PRESIDENT pro tempore. All time has been yielded back. The bill having been read the third time, the question is, Shall it pass? On this question the yeas and nays have been ordered and the clerk will call the roll.

The legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Montana (Mr. HATFIELD) and the Senator from West Virginia (Mr. RANDOLPH) are necessarily absent.

I further announce that, if present and voting, the Senator from West Virginia (Mr. RANDOLPH) would vote "yea".

Mr. STEVENS. I announce that the

[S 7158]

Senator from California (Mr. HAYAKAWA), the Senator from Nevada, (Mr. LAXALT), and the Senator from Oregon (Mr. PACKWOOD), are necessarily absent.

The result was announced—yeas 95, nays 0, as follows:

[Rollcall Vote No. 159 Leg.]

YEAS—95

Abourezk	Glenn	Morgan
Allen	Goldwater	Moynihan
Anderson	Gravel	Muskie
Baker	Griffin	Nelson
Bartlett	Hansen	Nunn
Bayh	Hart	Pearson
Bellmon	Haskell	Pell
Bentsen	Hatch	Percy
Biden	Hatfield, Mark O.	Proxmire
Brooke	Hathaway	Ribicoff
Bumpers	Heinz	Riegle
Burdick	Helms	Roth
Byrd, Harry F., Jr.	Hodges	Sarbanes
Byrd, Robert C.	Hollings	Sasser
Cannon	Huddleston	Schmitt
Case	Humphrey	Schweiker
Chafee	Inouye	Scott
Chiles	Jackson	Sparkman
Church	Javits	Stafford
Clark	Johnston	Stennis
Cranston	Kennedy	Stevens
Culver	Leahy	Stevenson
Curtis	Long	Stone
Danforth	Lugar	Talmadge
DeConcini	Magnuson	Thurmond
Dole	Mathias	Tower
Domenici	Matsunaga	Wallop
Durkin	McClure	Weicker
Eagleton	McGovern	Williams
Eastland	McIntyre	Young
Ford	Melcher	Zorinsky
Garn	Metzenbaum	

NAYS—0

NOT VOTING—5

Hatfield, Paul G.	Hayakawa	Packwood
	Laxalt	Randolph

So the bill (H.R. 130), as amended, was passed.

Mr. ROBERT C. BYRD. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. DURKIN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. DURKIN. Mr. President, I ask unanimous consent that the Secretary of the Senate be authorized to make technical and clerical corrections in the engrossment of the Senate amendents to H.R. 130, and that S. 743 be indefinitely postponed.

The PRESIDING OFFICER (Mr. DECONCINI). Without objection, it is so ordered.

Mr. ROBERT C. BYRD. Mr. President, I commend the distinguished managers of this bill, the Senator from New Hampshire, Mr. DURKIN, and the Senator from Wyoming, Mr. HANSEN, for their splendid handling of the Dealers Day in Court bill. The subject of protection of independent gasoline dealers from arbitrary cancellation by their oil company lessors has been debated and discussed for a long period of time in this body. I think the overwhelming vote by which this bill has passed the Senate attests to the splendid work of the managers of the bill, as well as of the distinguished chairman of the Energy Committee (Mr. JACKSON).

I think it is well to also remember the yeoman work of two of our former colleagues, Senator Philip Hart of Michigan and Senator Frank Moss of Utah, in the area of protection of franchised gasoline dealers. Their early efforts in this regard, I am sure, contributed to the approval of the bill by this body today.

APPENDIX J

HOUSE DEBATE ON TITLE III OF THE PETROLEUM MARKETING PRACTICES ACT

[124 Cong. Rec. H 4996 - 5003 (Daily ed., June 6, 1978).]

[H 4996]

MARKETING PRACTICES ACT

Mr. DINGELL. Mr. Speaker, I ask unanimous consent to take from the Speaker's desk the bill (H.R. 130) to provide for the protection of franchised distributors and retailers of motor fuel and to encourage conservation of automotive gasoline and competition in the marketing of such gasoline by requiring that information regarding the octane rating of autmotive gasoline be disclosed to consumers, with a Senate amendment thereto, and concur in the Senate amendment.

* * * * *

[Text of Petroleum Marketing Practices Act as enacted is omitted.]

[H 5001]

Mr. DINGELL (during the reading). Mr. Speaker, I ask unanimous consent to dispense with further reading of the Senate amendment, and that it be printed in the RECORD.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Michigan?

Mr. BROWN of Ohio. Mr. Speaker, I do not reserve the right to object to this request but I reserve the right to object to the taking up of the legislation. I shall not object but I want to protect my right to ask questions.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Michigan to dispense with further reading?

There was no objection.

The SPEAKER pro tempore. Is there objection to the first request of the gentleman from Michigan?

Mr. BROWN of Ohio. Mr. Speaker, reserving the right to object, I have no objection to the consideration of this legislation. It is a piece of legislation on which the Senate and House have come to general agreement. It is part of a package understanding that the members of the Energy and Power Subcommittee, both the majority and minority, have come to with the administration that relates to an administrative action of the administration in regard to pricing of and allocation of motor gasoline.

The proposal for the removal of price and allocation controls from motor gasoline will be submitted to the House, I believe, later today or tomorrow. Prior to that submission the gentleman from Michigan and I wanted to be sure that the so-called dealer-day-in-court legislation, which is what we now have under consideration, can be passed by both bodies and signed by the President and become law, so that the distributors, the individual service station operators are protected by certain rights extended to them in this legislation, rights which I think all Members of the House fully understand because we passed the legislation under suspension last April. Therefore I will not go into the extensive details of the legislation but would like to ask the gentleman from Michigan to please explain the changes in the House bill that the amendment he is offering by unanimous consent makes.

Mr. DINGELL. Mr. Speaker, will my good friend, the gentleman from Ohio yield?

Mr. BROWN of Ohio. I yield to the gentleman from Michigan.

Mr. DINGELL. Mr. Speaker, I would like to begin by commending my friend, the gentleman from Ohio, for the gentlemanly way in which he has assisted me in working on this particular piece of legislation and I wish to have his help known to my colleagues.

Mr. Speaker, the Senate adopted a number of amendments of a technical nature to title I of H.R. 130. The Senate adopted a procedural amendment to title II of H.R. 130. And the Senate adopted a new title, title III, dealing with competition and economic issues relating to gasoline marketing.

With respect to title I, the Senate expanded the coverage of the title to include marketers which have lost their brand or trademark licenses but have continued to receive motor fuel supplies through a continuation of supply agreements with their historical suppliers under allocation controls. The effect of this amendment is merely to permit supply agreements which, despite a subsequent withdrawal of a trademark, have existed continuously since May 15, 1973, to be treated as franchises for purposes of title I.

A second amendment to title I addresses a problem related to the term "distributor." The House bill could have required distinguishing a consignee's accounts from those of his supplier. As a result, a consignee might have been treated as a distributor with respect to some accounts but not with respect to others. Rather than attempting to delineate a means for making this determination, the Senate amendment treats a consignee as a distributor regardless of whether the account is that of the consignee or of his supplier. However the Senate amendment includes a provision paralleling language contained in the House report. This provision excludes from the definition of distributor employees of a supplier as well as persons who merely provide transportation services for the supplier. Therefore, the Senate amendment retains

the distinction that independent entrepreneurs are to be treated as distributors while employees of a supplier and common carriers are not.

Another Senate amendment addresses the question of contracts which do not reflect the actual gallonage which a franchisor has been supplying to the

franchisee. For a number of reasons, in many cases, contracts have not been revised to reflect actual volumes. The Senate amendment assures that the supply protection of title I is based upon actual volumes supplied under the established pattern of business rather than on gallonage specified in contracts which no longer reflect the supply practices of the parties. It is my understanding that this amendment is not intended to substitute for clear and explicit supply terms in recent contracts where those terms are intended by the parties to govern their relationship. The amendment permits the franchisor or franchisee to introduce evidence of past delivery levels. This evidence would raise a rebuttal presumption that an agreement exists to deliver the same monthly gallonage of motor fuel that the franchisor sold to the franchisee during the corresponding months of the previous year.

Another Senate amendment to title I deals with the vulnerability of rural States to market withdrawals by major suppliers of motor fuels. The Senate amendment addresses this matter by affording the governors of affected States advance notice of a franchisor's plans to withdraw from the marketing of motor fuel through retail outlets in a relevant market area.

With respect to title II of H.R. 130, a floor amendment was adopted making the environmental protection agency directly responsible for the field testing of the octane rating of automobile gasoline. The House bill provided a similar testing program; however, the Senate amend-

ment clarifies the responsibilities of the EPA and improves the coordination of the EPA's actions with the responsibilities of the FTC under this title.

Title III of the Senate amendment is a new title. The introduced bill contained a title III which dealt with the issue of subsidization of marketing by refiners and other suppliers with profits derived from crude oil production, refining operations, or other marketing activities. This title raised significant questions relating to market structure, competition, and consumer protection. The title was therefore deleted prior to consideration of H.R. 130 by the full House. After lengthy debate of this issue, the Senate followed the lead of the House by not adopting any legislative requirements dealing with this matter. Instead, the Senate approved a study of petroleum marketing subsidization issue. This study is intended to focus on market subsidization by both refiners and other marketers and will explore questions relating to market structure, competition, and consumer cost. The Secretary of the Department of Energy is required to consult both the chairman of the FTC and Attorney General in the preparation of this study. Title III does not authorize regulatory action to be taken dealing with these subsidization questions without further action of both Houses of Congress through future legislative action.

I thank the gentleman for yielding.

Mr. BROWN of Ohio. Mr. Speaker, further reserving the right to object, let me ask just two or three other questions. The amendment offered by the unanimous consent request of the gentleman to title I, the same substance as the amendment to title I added to the legislation by the other body, makes an addition to the House bill definition of "contract." This additional language states that delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels in subsequent years. Is it the gentleman's understanding that the additional language

only applies to contracts which do not reflect the actual gallonages which the franchiser is supplying the franchisee?

Mr. DINGELL. Will the gentleman from Ohio yield?

Mr. BROWN of Ohio. I will be glad to yield to the gentleman.

Mr. DINGELL. The answer to the question is yes.

Mr. BROWN of Ohio. The amendment offered by the unanimous consent request of the gentleman adds a new title III, the same substance as the title III added to the legislation by the other body, to provide for a study of subsidization of motor fuel marketing. Is it the understanding of the gentleman that this study shall be comprehensive in nature and shall extend to the total market so that not only refiner-marketers are examined as to the extent that they subsidize sales of motor fuel, but also that wholesaler-jobbers who supply more than one outlet are studied to determine the extent to which they subsidize sales of motor fuel.

Mr. DINGELL. Will the gentleman yield?

Mr. BROWN of Ohio. I yield to the gentleman.

Mr. DINGELL. I wish to agree with the gentleman, again making it clear, however, that these Senate amendments, in which the House is being called upon to concur, did not originate with the gentleman from Michigan.

Mr. BROWN of Ohio. However, the gentleman is offering them at this point for consideration by the House.

Mr. DINGELL. I do that. The answer to the question, however, again is yes.

Mr. BROWN of Ohio. Is it also the understanding of the gentleman that the study previously referred to should examine the extent to which present pricing practices of refiners and wholesalers of motor gasoline may in fact be resulting in lower prices of motor fuel to ultimate consumers?

Mr. DINGELL. Will the gentleman yield?

Mr. BROWN of Ohio. I yield to the gentleman from Michigan.

Mr. DINGELL. I thank the gentleman for yielding.

The answer to the question is again yes.

Mr. BROWN of Ohio. Finally, let me say to the gentleman from Michigan and the gentleman from West Virginia that I met yesterday at some length with officials of the Department of Energy, including Mr. John O'Leary, who have advised me that it is the plan of the Department of Energy to use the existing EIA P-302 and 306 forms by which they gather information from refineries, plus revised Bureau of Labor Statistics and Census surveys, in order to give them sufficient information regarding supply and price and market distribution to meet the minimum statutory requirements of the legislation under consideration at this point. This will also apparently be adequate to meet the obligations of the Department of Energy imposed in the environmental impact assessments, I have been advised. It is my understanding, therefore, that they will not require extensive or burdensome reporting by individual service station operators marketing gasoline products when DOE can get that information with a great deal less red tape, a great deal less paperwork, and a great deal less burden on the entire marketing system, by getting it from the refiners.

Mr. DINGELL. Will the gentleman from Ohio yield?

Mr. BROWN of Ohio. I yield to the gentleman from Michigan.

Mr. DINGELL. We have gone into the question of the decontrol proposal which will be shortly before the House and which we anticipate will be submitted by the Department of Energy with regard to motor vehicle gasoline. It is the understanding of the gentleman from Michigan that gasoline decontrol will not propose extensive new monitoring action by the Department of Energy which

would impose burdens upon industry, nor will it contain a price trigger for the reimposition of controls.

Mr. BROWN of Ohio. That is also my understanding.

Mr. STAGGERS. Mr. Speaker, will the gentleman yield?

Mr. BROWN of Ohio. I yield to the gentleman from West Virginia.

Mr. STAGGERS. I thank the gentleman for yielding.

I want to congratulate the gentleman from Ohio and the gentleman from Michigan (Mr. DINGELL) for the good work they have done in bringing this bill to the floor today and urge passage of it, with no one objecting to it because the bill represents a long overdue action that should have been taken by this Congress long ago to protect the independent retailers at the marketplace who deal with this subject when they go to get gasoline from the suppliers.

They just take away their supply arbitrarily and just say they are not dealing with them any more. This protects thousands of those, perhaps hundreds of thousands of those across America and also protects the motorists from increasing competition with the independent dealers there and also helps reduce costs; so I want to compliment the gentleman from Ohio and the gentleman from Michigan for working this out with the Senate and hope it passes the House. It is long overdue.

Mr. BROWN of Ohio. Mr. Speaker, finally, let me compliment the gentleman from West Virginia, who made this legislation possible. The gentleman always adds to the interest of our Nation in the conduct of that committee and

[H 5003]

also in the conduct of this legislation. This is a prime example.

Mr. Speaker, let me add my commendation to the chairmanship of the gentleman from Michigan (Mr. DINGELL),

with whom it is my pleasure to work. We do not always craft perfect legislation, but in this case we have come very close under the gentleman's leadership, with a certain contribution of the gentleman from Ohio who occasionally gets the gentleman from Michigan to agree with some of my viewpoints.

Mr. DINGELL. Mr. Speaker, will the gentleman from Ohio yield?

Mr. BROWN of Ohio. I yield to the gentleman from Michigan.

Mr. DINGELL. Mr. Speaker, I wish to commend my friend. The gentleman from Ohio has been a valuable player in this small drama. The gentleman's contribution is great and I wish to have the House and the gentleman's constituents know what the gentleman did in getting this through in the form in which it is. I commend the gentleman.

Mr. BROWN of Ohio. Mr. Speaker, I thank the gentleman, and for fear someone will want to call for a quorum to hear these remarks that are being exchanged between the gentleman from Michigan, the gentleman from West Virginia, and myself, I think I had better withdraw my objection so we can get the legislation passed and go on to other business.

Mr. Speaker, I withdraw my reservation of objection.

The SPEAKER. Is there objection to the first request of the gentleman from Michigan?

There was no objection.

A motion to reconsider was laid on the table.

APPENDIX K

STATUTES AND REGULATIONS INVOLVED

1. Section 301 of the Petroleum Marketing Practices Act ("PMPA"), Pub. L. No. 95-297, 92 Stat. 337, 15 U.S.C. § 2841, provides:

> SEC. 301. (a) The Secretary of Energy, in consultation with the Chairman of the Federal Trade Commission and the Attorney General and other agencies as the Secretary deems appropriate, shall conduct a study of the extent to which producers, refiners, and other suppliers of motor fuel subsidize the sale of such motor fuel at retail or wholesale with profits obtained from other operations.
>
> (b) Such study shall examine—
>
> (1) the role of vertically integrated operations in facilitating subsidization of sales of motor fuel at wholesale or retail;
>
> (2) the extent to which such subsidization is predatory and presents a threat to competition;
>
> (3) the profitability of various segments of the petroleum industry;
>
> (4) the impact of prohibiting such subsidization on the competitive viability of various segments of the petroleum industry, on prices of motor fuel to consumers and on the health and structure of the petroleum industry as a whole; and
>
> (5) such other matters as the Secretary considers appropriate.
>
> (c) In conducting the study required by this section, the Secretary shall give appropriate notice and afford interested persons an opportunity to present written and oral data, views and arguments concerning such study.

(d) (1) The Secretary shall report the results of the study required by this section, together with such recommendations for legislative action and such statistical evidence as he deems appropriate to the Congress on or before the expiration of the eighteenth month after the date of enactment of this section.

(2) If the President determines that interim measures are necessary and appropriate to maintain the competitive viability of the marketing sector of the petroleum industry during Congressional consideration of the recommendations contained in the report submitted under paragraph (1), he shall prescribe, by rule, in accordance with the procedures set forth in section 523(a) of the Energy Policy and Conservation Act (42 U.S.C. 6393) such interim measures.

(3) No interim measure proposed by the President under this section may be submitted after January 1, 1980, and the effect of such measure if approved by the Congress under paragraph (4) may not extend beyond 18 months after such Congressional approval.

(4) Such interim measure shall not take effect unless approved by both Houses of Congress as if it were a contingency plan under section 552 of the Energy Policy and Conservation Act (42 U.S.C. 6422): *Provided*, That the 60-day period referred to in such section shall be extended to 90 days for purposes of this section.

(e) There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

2. Section 203 of PMPA, 92 Stat. 335, 15 U.S.C. § 2823, provides in pertinent part:

> (a) The Federal Trade Commission shall have procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements of this

> title and rules prescribed pursuant to the requirements of this title, to further define terms used in this title, and to require the filing of reports, the production of documents, and the appearance of witnesses, as though the applicable terms and conditions of the Federal Trade Commission Act were part of this title.
>
> * * * * *
>
> (e) It shall be an unfair or deceptive act or practice in or affecting commerce (within the meaning of section 5(a)(1) of the Federal Trade Commission Act) for any person to violate subsection (a), (b), (c), or (e) of section 202, or a rule prescribed under subsection (d) of such section. For purposes of the Federal Trade Commission Act (including any remedy or penalty applicable to any violation thereof) such a violation shall be treated as a violation of a rule under such Act respecting unfair or deceptive acts or practices; except that for purposes of section 5(m)(1)(A) of such Act, the term "or knowledge fairly implied on the basis of objective circumstances" shall not apply to any violation by any gasoline retailer of the requirements of section 202(c) or (e).

3. Section 645 of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 599, as amended, 42 U.S.C. § 7255, provides:

> For the purpose of carrying out the provisions of this Act, the Secretary, or his duly authorized agent or agents, shall have the same powers and authorities as the Federal Trade Commission under section 9 of the Federal Trade Commission Act with respect to all functions vested in, or transferred or delegated to, the Secretary or such agents by this Act. For purposes of carrying out its responsibilities under the Natural Gas Policy Act of 1978, the Com-

mission shall have the same powers and authority as the Secretary has under this section.

4. 10 C.F.R. § 205.8 provided, at the time the subpoena in this case was issued:

(a) The Administrator of the FEA, his duly authorized agent, the FEA General Counsel, or the agency official designated to conduct a hearing or public hearing convened in accordance with Subpart M of this part may sign and issue subpoenas either on his own initiative or, upon an adequate showing that the information sought will materially advance the proceeding, upon the request of any person participating in that proceeding.

(b) A subpoena may require the attendance of a witness, or the production of documentary or other tangible evidence in the possession or under the control of the person served, or both.

(c) A subpoena may be served personally by any person who is not an interested person and is not less than 18 years of age, or by certified or registered mail.

(d) Service of a subpoena under the person named therein shall be made by delivering a copy of the subpoena to such person and by tendering the fees for one day's attendance and mileage as specified by paragraph (f) of this section. When a subpoena is issued at the instance of any officer or agency of the United States, fees and mileage need not be tendered at the time of service. Delivery of a copy of a subpoena and tender of the fees to a natural person may be made by handing them to the person, leaving them at his office with the person in charge thereof, leaving them at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, by mailing them by

registered or certified mail to him at his last known address, or by any method whereby actual notice is given to him and the fees are made available prior to the return date. When the person to be served is not a natural person, delivery of a copy of the subpoena and tender of the fees may be effected by handing them to a registered agent for service, or to any officer, director, or agent in charge of any office of such person, or by mailing them by registered or certified mail to such representative at his last known address or by any method whereby actual notice is given to such representative and the fees are made available prior to the return date. If any person is an entity with offices and operations in more than one jurisdiction, such person may designate one address to which any subpoena may be served by filing such designation with the General Counsel at the address specified in § 205.12.

(e) The original subpoena bearing a certificate of service shall be filed with the FEA office with the responsibility for the proceeding in connection with which the subpoena was issued.

(f) A witness subpoenaed by the FEA shall be paid the same fees and mileage as would be paid to a witness in a proceeding in the district courts of the United States. The witness fees and mileage shall be paid by the person at whose instance the subpoena was issued.

(g) Notwithstanding the provisions of paragraph (f) of this section, and upon request, the witness fees and mileage shall be paid by the FEA when it is shown that:

(1) The presence of the subpoenaed witness will materially advance the proceeding; and

(2) The person at whose instance the subpoena was issued would suffer a serious hardship if required to pay the witness fees and mileage.

The designated FEA official issuing the subpoena shall make the determination required by this paragraph.

(h) (1) Any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than ten (10) days after the date of service such subpoena, apply to quash or modify such subpoenas to the FEA official who issued the subpoena, who may (i) deny the application; (ii) quash or modify the subpoena; or (iii) condition denial of the application to quash or modify the subpoena upon the satisfaction of certain just and reasonable requirements. A denial of an application must contain a statement of facts and conclusions of law.

(2) Within 10 days after the day of service of any adverse decision on an application to quash or modify a subpoena, an applicant may seek review of that decision from the Regional Administrator for the region which issued the subpoena, or the Assistant Administrator or Director of the office which issued the subpoena in the case of subpoenas issued by the National Office. The relief requested may include a request for a stay of the obligation to comply with the subpoena, for good cause shown, pending a determination by the Regional Administrator or Assistant Administrator or Director of the office which issued the subpoena. The Regional Administrator or other reviewing official will evaluate the application and render a determination. A denial of an application must contain a statement of facts and conclusions of law.

(3) If the Regional Administrator or other reviewing official fails to take action on an application for review within 20 days of filing, the application for review will be deemed to have been denied in all respects as of 12:01 a.m. on the day following the 20th day.

(4) Any person to whom a subpoena is directed, in the event that an application to quash or modify such subpoena is in any part denied by a Regional Administrator or other reviewing official, may, within ten (10) days after the date of service of such denial, seek relief from the Office of Private Grievances and Redress, at the address provided in § 205.12, only upon a showing that the circumstances are so exceptional that an immediate review is warranted to correct substantial errors of law, or to prevent substantial injury to legal rights, or to cure a gross abuse of administrative discretion. The relief requested may include a request for a stay of the obligation to comply with the subpoena, for good cause shown, pending a determination by the Office of Private Grievances and Redress.

(5) Return on any subpoena issued by FEA pursuant to § 205.8 is temporarily stayed pending timely application for and during administrative review by FEA as specified in § 205.8(h) (1).

(i) If there is a refusal to obey a subpoena served upon any person under the provisions of this section, the FEA may request the Attorney General to seek the aid of the District Court of the United States for any district in which such person is found to compel such person after notice, to appear and give testimony, or to appear and produce the subpoenaed documents before the agency or both.

Supreme Court, U. S.
FILED
MAY 3 1980
MICHAEL RODAK, JR., CLERK

Nos. 79-1384, 79-1394, and 79-1395

In the Supreme Court of the United States

OCTOBER TERM, 1979

EXXON CORPORATION, PETITIONER
v.
UNITED STATES OF AMERICA

SHELL OIL COMPANY, PETITIONER
v.
UNITED STATES OF AMERICA

MARATHON OIL COMPANY, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a)[1] is not yet reported. The opinion of the district court (Pet. App. 29a-36a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1980 (Pet. App. 23a-24a). The petition for a

[1]Unless otherwise indicated, "Pet. App." refers to the appendix in No. 79-1384.

writ of certiorari in No. 79-1384 was filed on March 7, 1980; the petitions in Nos. 79-1394 and 79-1395 were filed on March 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Department of Energy subpoenas seeking information for a study mandated by Congress were lawfully issued for a purpose within the authority of the agency and were properly enforced.

STATUTES INVOLVED

Title III of the Petroleum Marketing Practices Act, 15 U.S.C. (Supp. II) 2841, provides, in pertinent part:

> (a) The Secretary of Energy, in consultation with the Chairman of the Federal Trade Commission and the Attorney General and other agencies as the Secretary deems appropriate, shall conduct a study of the extent to which producers, refiners, and other suppliers of motor fuel subsidize the sale of such motor fuel at retail or wholesale with profits obtained from other operations.
>
> (b) Such study shall examine—
>
> (1) the role of vertically integrated operations in facilitating subsidization of sales of motor fuel at wholesale or retail;
>
> (2) the extent to which such subsidization is predatory and presents a threat to competition;
>
> (3) the profitability of various segments of the petroleum industry;
>
> (4) the impact of prohibiting such subsidization on the competitive viability of various segments of the petroleum industry, on prices of motor fuel to consumers and on the health and structure of the petroleum industry as a whole; and
>
> (5) such other matters as the Secretary considers appropriate.

Section 13(e)(1) of the Federal Energy Administration Act, 15 U.S.C. 772(e)(1), provides:

> The Administrator, or any of his duly authorized agents, shall have the power to require by subpoena the attendance and testimony of witnesses, and the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence which the Administrator is authorized to obtain prusuant to this section.

Section 301(a) of the Department of Energy Organization Act, 42 U.S.C. (Supp. I) 7151(a), provides, in pertinent part:

> Except as otherwise provided in this chapter, there are transferred to, and vested in, the Secretary all of the functions vested by law in the Administrator of the Federal Energy Administration * * *.

Section 645 of the Department of Energy Organization Act, 42 U.S.C. (Supp. I) 7255, provides:

> For the purpose of carrying out the provisions of this chapter, the Secretary, or his duly authorized agent or agents, shall have the same powers and authorities as the Federal Trade Commission under section 49 of Title 15 with respect to all functions vested in, or transferred or delegated to, the Secretary or such agents by this chapter.

Section 9 of the Federal Trade Commission Act, 15 U.S.C. 49, provides, in pertinent part:

> For the purposes of this subchapter the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.

STATEMENT

1. The United States initiated these actions to enforce three identical subpoenas duces tecum issued to petitioners on January 22, 1979, by the Department of Energy (Pet. App. 42a-46a). Statutory authority for issuance of the subpoenas was provided by Section 645 of the Department of Energy Organization Act (DOEOA), 42 U.S.C. (Supp. I) 7255, and Section 13(e) of the Federal Energy Administration Act (FEAA), 15 U.S.C. 772(e).[2] The subpoenas sought source information for a study mandated by Congress in Title III of the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. (Supp. II) 2841. In that statute, Congress directed the Secretary of Energy to investigate "subsidization"—"the extent to which producers, refiners, and other suppliers of motor fuel subsidize the sale of such motor fuel at retail or wholesale with profits obtained from other operations."

[2]The subpoena power granted to the FEA Administrator by Section 13(e) of the FEAA was transferred to the Secretary of Energy by Section 301(a) of the DOEOA, 42 U.S.C. (Supp. I) 7151(a).

The Director of the Office of Competition in DOE's Office of Policy and Evaluation is the administrative official charged with the responsibility of preparing a draft of the report on subsidization to be submitted to Congress in accordance with Section 301(d)(1) of the PMPA. He issued the subpoenas to petitioners pursuant to a delegation of authority from the Secretary (79-1394 Pet. App. 104a-107a).

2. In accordance with Section 301(c) of the PMPA, 15 U.S.C. (Supp. II) 2841(c), DOE published a notice describing the statutory requirement that it conduct a subsidization study. 43 Fed. Reg. 41422 (1978). The DOE notice announced the date of a public hearing to consider the procedures DOE should adopt in conducting the study and invited comments from interested persons. All three petitioners submitted comments. After considering the written submissions of petitioners and others and the comments made at the October 1978 hearing, DOE developed a plan for the study required by the PMPA and published it in the Federal Register. 44 Fed. Reg. 3548 (1979). DOE stated that, in order to obtain "[i]nternal planning and financial documents" that it believed were necessary for completion of the task set by Congress, it would subpoena information from nine oil companies. *Id.* at 3552.[3]

[3]DOE's notice explained that the nine companies to be subpoenaed "will likely include the largest marketers, those that conduct operations in the chosen regions, those refiners who have accounted for the increase in the refiner owned and operated retail outlets, and those firms that represent a mix of the types of marketing strategies and public accounting records used in the industry." 44 Fed. Reg. 3552 (1979).

Nine identical subpoenas were issued in January 1979 (Pet. App. 42a-46a). DOE thereafter entered into negotiations with all nine affected companies concerning the production of the requested materials. Six of the companies reached settlement agreements with DOE, and they produced substantially all of the documents sought by the agency.[4] Petitioners attempted to quash the subpoenas at the administrative level, but DOE informed them (Pet. App. 41a) that the administrative review procedures provided in 10 C.F.R. 205.8(h) (1978) (reprinted in Pet. App. 100a-101a) apply only to subpoenas issued in connection with the specific agency functions described in 10 C.F.R. Parts 209-214 and not to subpoenas issued for the purpose of the PMPA study.[5] When attempts to obtain voluntary compliance by petitioners failed, the government filed petitions to enforce the DOE subpoenas in the United States District Court for the District of Columbia.

3. The district court enforced the subpoenas (Pet. App. 27a-36a), holding that the PMPA study fell within the general responsibilities assigned to DOE under the agency's enabling act and that therefore the subpoenas were authorized by Section 645 of the DOEOA, 42 U.S.C.

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[4]The six companies with which DOE reached agreement are Ashland Oil, Company, Altantic Richfield Oil Company, Clark Oil & Refining Company, Gulf Oil Corporation, Standard Oil Company (Indiana), and Texaco, Inc.

[5]In reaching this conclusion, DOE relied on 10 C.F.R. 205.1, which states:

> This part establishes the procedures to be utilized and identifies the sanctions that are available in proceedings before the Department of Energy and State Offices, in accordance with Parts 209 through 214 of this chapter.

(Supp. I) 7255. The court rejected petitioners' argument that the language and legislative history of Title III of the PMPA evidence Congress' intent that the subsidization study be conducted solely through the voluntary cooperation of the oil companies, without resort to subpoenas (Pet. App. 32a). The court also rejected the contention that the Secretary's subpoena power is limited to investigation of particular firms' compliance with existing law and does not extend to studies of industry-wide conditions (*id.* at 34a). The court ruled that "the subpoenas are not burdensome or unreasonable in view of the information sought and the requirements of the PMPA" (*id.* at 35a).

In addition, the district court sustained DOE's refusal to provide an administrative review procedure by which petitioners could seek to quash the subpoenas. The court held that the procedures described in 10 C.F.R. 205.8(h) (1978) do not apply to subpoenas issued for purposes of the PMPA study and that petitioners' due process rights were adequately protected by the opportunity to be heard in district court before judicial enforcement of the subpoenas (Pet. App. 34a-35a).

4. A divided panel of the court of appeals affirmed (Pet. App. 1a-22a). The court observed that Title III of the PMPA "specifically *instructs* DOE to conduct a study which the agency would in any event *be permitted* to conduct under its broad general DOEOA mandate" (*id.* at 5a). The court therefore held that the general subpoena authority conferred by 42 U.S.C. (Supp. I) 7255 is sufficient to support the subpoenas issued to petitioners, even though Title III itself does not refer explicitly to the

use of subpoenas in performing the subsidization study. The court explained (Pet. App. 6a):

> Since DOE * * * already possessed subpoena power for a general study of subsidization when Congress passed Title III, that statute's silence on subpoena power would seem to be of no consequence: Congress would have had to build into Title III a clear withdrawal of subpoena power if it did not want DOE to issue subpoenas for the Title III study.

The court of appeals also determined that "[t]he oil companies' procedural objections to the subpoena merit little attention" (Pet. App. 12a). The court saw no reason to disagree with DOE's position that the administrative review procedure established by the agency's regulations does not apply to the subpoenas in this case. Moreover, the court concluded (*ibid.*), neither the Administrative Procedure Act nor the Due Process Clause requires an agency to promulgate review regulations applicable to all subpoenas that the agency issues. The court of appeals agreed with the district court that the opportunity for a judicial hearing is enough to satisfy constitutional guarantees, and the court found no evidence that the district court proceeding in this case was unfair or unreasonable. The court of appeals thus upheld enforcement of the subpoenas but imposed a protective order (*id.* at 14a-21a) designed to afford petitioners approximately the same safeguards already accepted by DOE as part of the negotiated settlement with the six oil companies that voluntarily complied with the subpoenas.[6]

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[6]The primary protections afforded by the court's order are as follows: Petitioners may designate subpoenaed documents as "confidential" or "extremely confidential," and materials placed in either category will be kept in locked files and will be used by DOE only under secure conditions. "Extremely confidential" materials will generally remain in the company's possession (subject to inspection and, if necessary, copying by DOE employees) and will not become agency records subject to public disclosure under the Freedom of Information Act. No government agency will exercise whatever discretion it might otherwise have under the FOIA to release subpoenaed materials exempt from mandatory disclosure.

Only one potentially significant protection was included in the DOE agreement with the six companies that complied voluntarily with the subpoenas but not in the court of appeals' protective order applicable to petitioners. It concerns the use of subpoenaed information by the Department of Justice and the Federal Trade Commission. Congress directed that the Secretary of Energy should conduct the PMPA study "in consultation with the Chairman of the

Judge Wilkey dissented. In a brief opinion (Pet. App. 22a), he announced his agreement with petitioners' contentions that DOE lacks statutory authority to issue the subpoenas and that, in any event, the subpoenas are too broad and burdensome.

5. The court of appeals' judgment initially ordered petitioners to produce the subpoenaed documents by March 3, 1980, two weeks before the court's mandate ordinarily would have issued under Fed. R. App. P. 41(a) (Pet. App. 16a, 24a). Petitioners moved to stay the mandate, and the court granted the motion "to and including March 10, 1980, on which date the Clerk is directed to issue the mandate in these cases" (*id.* at 26a). Petitioners applied to this Court for a stay of the court of appeals' mandate pending the filing and disposition of the present petitions for certiorari. On March 7, 1980, the Chief Justice requested a response to the stay applications and granted a temporary stay pending further order of the Court. The Court denied the stay applications on March 17, 1980 (Nos. A-756, A-760, and A-761), and petitioners have submitted documents to DOE that they assert represent full compliance with the DOE subpoenas.

ARGUMENT

The courts below correctly enforced the DOE subpoenas. The decision of the court of appeals does not conflict with the ruling of any other circuit or with any previous decision of this Court. Moreover, the significance of the questions presented by petitioners is limited to the three subpoenas at issue in this case. Title III of the PMPA was enacted for a limited purpose: Congress wished to instruct DOE to conduct a single study of oil company subsidization of wholesale and retail motor fuel sales with profits earned by other company operations. That study will be completed shortly, and Title III will have no further effect. DOE will not issue subpoenas to acquire any additional information related to the task assigned by Congress. Under these circumstances, review by this Court is not warranted.

1. The court of appeals correctly held that DOE was empowered to conduct the subsidization study, even before the PMPA directed the agency to do so, and that therefore the subpoena authority conferred by the

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Federal Trade Commission and the Attorney General and other agencies as the Secretary deems appropriate * * *." 15 U.S.C. (Supp. II) 2841(a). Without the approval of the Department of Justice or the FTC, DOE assured the six voluntarily complying companies that any information they produced in response to the subpoenas would not be used by either the Department of Justice or the FTC for any purpose other than the PMPA study. Petitioners sought inclusion of a similar provision in the court of appeals' protective order. The court of appeals refused (Pet. App. 15a n.8), holding that no such additional protection was required by law. The court stated (*ibid.*):

> [Petitioners] have not alerted us to any authority, either in general or in the text or legislative history of PMPA, for requiring such extraordinary protection. Thus, we are loath to make such protection part of our Protective Order, especially since Title III expressly provides for consultation between DOE and other agencies.

DOEOA, 42 U.S.C. (Supp. I) 7255, was properly invoked by the agency in performing the inquiry mandated by Congress.[7]

Congress created DOE to "promote the general welfare by assuring coordinated and effective administration of Federal energy policy and programs." 42 U.S.C. (Supp. I) 7112. In particular, Congress intended "to promote the interests of consumers through the provision of an adequate and reliable supply of energy at the lowest reasonable cost; * * * to foster and assure competition among parties engaged in the supply of energy and fuels; * * * [and] to foster insofar as possible the continuing good health of the Nation's small business firms * * * involved in energy production, transportation, research, development, demonstration, marketing, and merchandising * * *." 42 U.S.C. (Supp. I) 7112(9), (12), (17).

To accomplish these goals, Congress provided for the appointment of eight Assistant Secretaries of Energy, one of whom is responsible for "the promotion of competition in the energy industry and for * * * assisting the Secretary

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[7]Because the district court and the court of appeals determined that the Secretary's subpoena authority under Section 645 of the DOEOA, 42 U.S.C. (Supp. I) 7255, is sufficient to support the subpoenas in this case, they found it unnecessary to consider the government's additional argument that the disputed subpoenas were validly issued under the statutory authority conferred on the FEA Administrator by Section 13(e) of the FEAA, 15 U.S.C. 772(e), and transferred to the Secretary by Section 301(a) of the DOEOA, 42 U.S.C. (Supp. I) 7151(a) (Pet. App. 5a n.4, 34a). The FEAA specifically directed the Administrator to respond to requests for information from congressional committees, 15 U.S.C. 774(d), and to perform such additional tasks as might be assigned by Congress, 15 U.S.C. 764(b)(12). Although, as the courts below held, resolution of the question is not necessary for the disposition of this case, Section 13(e) of the FEAA does provide a separate and independent basis for upholding the challenged subpoenas.

in the formulation and analysis of policies, rules, and regulations relating to competition and consumer affairs." 42 U.S.C. (Supp. I) 7133(a)(7). In addition, Congress established the Energy Information Administration within DOE to gather and disseminate information on the energy industry, including economic and statistical data. 42 U.S.C. (Supp. I) 7135(a)(1) and (2). Congress transferred to EIA the functions previously assigned to the Office of Energy Information and Analysis in the Federal Energy Administration. 42 U.S.C. (Supp. I) 7135(c). Among these functions is the maintenance of information on the economic structure of the energy supply system, "including patterns of ownership and control of mineral fuel and nonmineral energy resources and the production, distribution, and marketing of mineral fuels and electricity * * *." 15 U.S.C. 790a(b)(1). Finally, the DOEOA requires the Secretary to transmit an annual report to Congress addressing, *inter alia*, the effectiveness of competitive and regulatory practices of government and private entities. 42 U.S.C. (Supp. I) 7267(5).

The study that DOE was ordered to conduct under Title III of the PMPA was thus well within the Secretary's previously-existing statutory authority, and the court of appeals was fully justified in concluding (Pet. App. 6a) that the disputed subpoenas were properly issued "[f]or the purpose of carrying out the provisions of [the DOEOA]" and "with respect to [the] functions vested in, or transferred or delegated to, the Secretary or [his] agents by [the DOEOA]." 42 U.S.C. (Supp. I) 7255. The silence of Title III of the PMPA on the availability of subpoena power for the subsidization study did not deprive the Secretary of authority he already possessed. There is simply no reason to construe the congressional mandate for the PMPA study as restricting the means by

which the Secretary can perform a task he was already empowered to perform before the PMPA was enacted. If any inference must be drawn from the PMPA, it is to the contrary: once Congress decided to direct the Secretary to conduct a study he previously could have undertaken at his own initiative, Congress presumably had every motive to ensure that the Secretary would use all available means to produce the most thorough and informative report possible. In any event, the mere omission of any mention of the subpoena power in Title III of the PMPA should not be interpreted as a limitation of powers already expressly conferred. If the Secretary is to be stripped of a power explicitly granted by statute, the later statute must be at least equally explicit. See *TVA* v. *Hill*, 437 U.S. 153, 189-190 (1978).

Petitioners advance two arguments in support of their view that DOE may not issue subpoenas in aid of the PMPA study. First, they contrast Section 301(c) of the PMPA, 15 U.S.C. (Supp. II) 2841(c), with the explicit grant of enforcement authority to the Federal Trade Commission in Title II of the same statute. Section 203(a), 15 U.S.C. (Supp. II) 2823(a). Section 301(c) provides that, in conducting the subsidization study, the Secretary "shall give appropriate notice and afford interested persons an opportunity to present written and oral data, views and arguments concerning such study." Section 203(a) provides that, with respect to the octane testing and disclosure requirements imposed by Section 202 of the PMPA, 15 U.S.C. (Supp. II) 2822, the FTC "shall have procedural, investigative, and enforcement powers, including the power * * * to require the filing of reports, the production of documents, and the appearance of witnesses, as though the applicable terms and conditions of the Federal Trade Commission Act * * *

were part of [Title II of the PMPA]." The differences between these provisions, petitioners argue, show that Congress intended to permit FTC subpoenas under Title II but not DOE subpoenas under Title III. The court of appeals correctly observed that the purpose of Title II is completely different from that of Title III and, accordingly, the provisions of one part of the PMPA offer little or no assistance in the interpretation of another. As the court of appeals explained (Pet. App. 9a):

> Title II is primarily a directive to *private* parties to fulfill general reporting requirements imposed by the Act. Title II, however, secondarily establishes the FTC as the enforcing agency, and Congress may have felt a need to spell out the FTC's enforcement powers in some detail. Title III, in contrast, is primarily a directive to a government agency, the Department of Energy, and Congress may reasonably have understood Title III to incorporate DOE's general enforcement powers from the DOEOA.

Second, petitioners point to the legislative history of Title III of the PMPA, where they purportedly find evidence that Congress intended not to permit the use of subpoenas in connection with the subsidization study. As the district court and the court of appeals correctly concluded, however, the legislative history reveals no such intent. We adopt fully the court of appeals' detailed commentary (Pet. App. 8a) on the remarks by Senator Bumpers to which petitioners attribute such great significance (see, *e.g.*, 79-1384 Pet. 11-15). Those remarks show at most that one Senator may have been temporarily confused about the availability of the Secretary's subpoena power in connection with the PMPA study.

The exchange from which the remarks are taken demonstrates mainly that all the Senators involved in the debate sought to encourage voluntary cooperation by the oil companies in order to enable DOE to meet the statutory deadline for completion of the study.[8] Senator Bumpers made his comments in the course of debate on an amendment proposed by Senator Kennedy that would have directed DOE to share information acquired in the course of the study with the FTC and the Department of Justice (Pet. App. 61a-62a). Senator Bumpers opposed the amendment, arguing that, if it were enacted, oil companies would be less likely to submit needed information voluntarily to DOE (*id.* at 63a-66a). The question under discussion was not whether DOE could compel the production of information by subpoena, but whether Senator Kennedy's amendment would reduce the probability of voluntary cooperation by the oil companies, cooperation that Congress had every reason to encourage in light of the time constraints within which the study was to be performed. The court of appeals was correct, therefore, in concluding that Senator Bumpers' apparent assumption about the Secretary's subpoena power "was simply not centrally relevant to the debate" and did not provoke a challenge from any other Senator for that reason (*id.* at 8a).

Moreover, this Court has recognized that the remarks of a single legislator, even a statute's sponsor, are not necessarily dispositive in the judicial interpretation of an

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[8]Section 301(d)(1) of the PMPA, 15 U.S.C. (Supp. II) 2841(d)(1), directed the Secretary to report the results of the study to Congress by December 19, 1979. In large part because of difficulties encountered in obtaining necessary information, the Secretary has informed Congress that the study will not be available before April 30, 1980.

Act of Congress. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979). This principle applies with special force when the remarks in question are cited not only for what they may imply about the statute under consideration when they were made but also, as in this case, for what they may suggest about the proper construction of an earlier law not the subject of legislative attention at the time of the statements. See, *e.g.*, *American Maritime Ass'n* v. *Blumenthal*, 458 F. Supp. 849, 859 (D.D.C. 1977), aff'd, 590 F. 2d 1156 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979). Legislative history of the latter kind ordinarily should receive little weight.

2. Petitioners' procedural objection to DOE's failure to provide for administrative review of the disputed subpoenas is insubstantial. The DOE regulation on which petitioners rely does not apply to the subpoenas issued in connection with the PMPA study. As the district court correctly observed (Pet. App. 34a-35a), the review procedure established by DOE applies only to subpoenas issued in connection with the agency functions described in 10 C.F.R. Parts 209-214, none of which is implicated here. Moreover, even if petitioners were correct in asserting that DOE's regulations were intended to make administrative review available for all subpoenas issued by the agency, they have not identified any way in which the failure to afford that review prejudiced them in this case.[9] As we discuss in the paragraphs that follow, petitioners had an opportunity to object to the subpoenas in the district court, and they have not shown why that opportunity was diminished because prior administrative review was not provided.

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[9]Petitioner Shell is incorrect in asserting that an agency's mere failure to comply with its own regulations "results in a deprivation of due process of law" (79-1394 Pet. 14). See *United States* v. *Caceres*, 440 U.S. 741 (1979).

Neither the Administrative Procedure Act nor the Due Process Clause requires initial review of a subpoena within the issuing agency. The APA, 5 U.S.C. 555(d), provides for judicial enforcement of administrative subpoenas but does not impose any obligation on government agencies to permit administrative challenges before seeking such enforcement. The district court and the court of appeals properly refused to engraft an additional administrative procedure onto those adopted by the agency at its own initiative. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978).

Petitioners' due process rights were adequately protected through the district court hearing on DOE's request for enforcement of the subpoenas. It is only after judicial enforcement of a subpoena that sanctions may be imposed for noncompliance. *Reisman* v. *Caplin*, 375 U.S. 440 (1964). Petitioners were afforded a full opportunity to raise all their objections to the subpoenas in the district court.

This Court long ago acknowledged that the role of the district court in subpoena enforcement actions is a limited one. The court must determine only that the subpoenaed information is sought for a lawfully authorized purpose, that the documents are relevant to the agency's inquiry, and that the demand is reasonable. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946). The procedure for judicial enforcement of administrative subpoenas is summary and *sui generis*. It is not a review on an administrative record under the APA, 5 U.S.C. 706, as petitioner Shell seems to suggest (79-1394 Pet. 16-19). Even now, petitioners do not raise any objection to the subpoenas that was not fully litigated in the courts below, and they do not describe any way in which meritorious

objections were rendered ineffective by the procedure followed by DOE. Under these circumstances, and particularly in light of the safeguards afforded by the court of appeals' protective order, enforcement of the subpoenas was proper.[10]

[10]Petitioner Shell's assertion (79-1394 Pet. 20-22) that it is entitled to precisely the same protection to which DOE agreed in negotiations with the six voluntarily complying companies is without merit. In order to obtain the subpoenaed information from the companies quickly and with a minimum of legal difficulty, DOE agreed to a protective condition not required by law and not approved by the Department of Justice or the FTC (see note 6, *supra*). Nothing in the PMPA requires that federal agencies be precluded from using properly obtained information for any legitimate governmental purpose, and the court of appeals correctly held that petitioners are not entitled, as a matter of right, to impose restrictions on the Department of Justice or the FTC, merely because DOE agreed to such restrictions as part of a negotiated settlement with other companies that received subpoenas.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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